U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 October 2004

CASE NOS.: 2004-LHC-62
2004-LHC-63

OWCP NOS.: 07-138057
07-136002

IN THE MATTER OF:

ANDY J. BERGERON

Claimant

v.
NORTHROP GRUMMAN/AVONDALE INDUSTRIES, INC.,

Employer

APPEARANCES:

JEREMIAH SPRAGUE, ESQ.

For The Claimant

RICHARD VALE, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Andy J. Bergeron (Claimant) against Northrop Grumman/Avondale Industries, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice

of Hearing was issued scheduling a formal hearing on April 16, 2004, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 8 exhibits, Employer/Carrier proffered 27 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were due from the Claimant and the Employer on June 7, 2004. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on March 9, 1995.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on March 9, 1995.

5. That Employer filed a Notice of Controversion on December 8, 1995; October 21, 1996; September 20, 1999; and December 6, 1995.

6. That an informal conference before the District Director was held on June 19, 2003.

7. That Claimant received temporary total disability benefits from March 10, 1995 through March 26, 1995; from April 4, 1995 through July 23, 1995; from November 23, 1995 through July 28, 1996; from August 6, 1996 through October 14, 1996; and from January 17, 2000 through June 7, 2000 at a compensation

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer Exhibits: EX-___; and Joint Exhibit: JX-___.

rate of $337.27 for 48 and 5/7 weeks for his March 9, 1995, injury.[2] Claimant also received "LWEC" from July 24, 1995 through October 22, 1995 for 13 weeks at a compensation rate of $167.13 per week. Claimant also received permanent partial disability based on an impairment rating of 7.5% of the right knee at a compensation rate of $337.27 for 21.6 weeks. Claimant also received permanent partial disability benefits based on an impairment rating of 7.5% at a compensation rate of $337.27 for 7.20 weeks.

8. Claimant was paid temporary total disability benefits from "January 23, 1995 to July 28, 1996" for his September 18, 1995 injury.

9. That medical benefits for Claimant have been paid in the amount of $41,662.09 pursuant to Section 7 of the Act.

10. Claimant's average weekly wage at the time of injury was $505.90.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury relating to alleged back and shoulder injuries.

2. The nature and extent of Claimant's disability.

3. Whether Claimant has reached maximum medical improvement.

4. Claimant's average weekly wage at the time of each injury.

5. The reasonableness and necessity of recommended shoulder surgery.

6. Entitlement to and authorization for medical care and services.

7. Attorney's fees, penalties and interest.

[2] The parties further stipulated that Claimant was paid temporary total disability benefits from "January 23, 1995 to July 28, 1996" for his September 18, 1995 injury.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was 46 years old and a resident of Thibodaux, Louisiana at the time of trial. Claimant injured his right knee while working at Avondale on "March 5, 1995." Claimant was returning to his work area when his left foot "slipped between the track and the dock" causing him to fall on his right knee. (Tr. 81).

Claimant testified that he experiences lower back pain that affects his ability to sleep and occasionally requires him to stay in bed all day. He stated the lower back pain began when his knee "gave out" and he fell against his couch at home. (Tr. 85). His knee "gave out" one time before that incident. When Claimant fell against his couch, he sought medical treatment from Dr. Maki at Thibodaux General, but Dr. Maki instructed Claimant to go to the Charity Hospital in Houma. (Tr. 86).

Claimant can stand for three to four hours before his knee begins to hurt badly. He sits down because his knee will give out and it takes the "rest of the day" to recover from the standing. (Tr. 92). Claimant walks around his yard and walks around Wal-Mart when he has to do shopping, but the walking causes discomfort in his knee and lower back. He is able to walk around Wal-Mart for a maximum of one to one and one-half hours, at which point he rests in his van while his family continues shopping. The discomfort in his knee and lower back remains for the rest of the day. (Tr. 93-94).

Claimant obtained his GED in 1983. Prior to obtaining his GED, Claimant did not complete the ninth grade. (Tr. 90). He tried to go to college through Louisiana Rehab and he underwent psychological testing in connection with Louisiana Rehab. He stated the testing indicated learning disabilities, which require extended time for test taking and tutored instruction for Claimant to master certain skills. According to Claimant's testimony, the tests also indicated that he is "good with his hands." (Tr. 89-91). Claimant testified that he was diagnosed with dyslexia at Nicholls State University. (Tr. 91). On cross-examination, he stated that he has medical records which diagnosed him with Attention Deficit Disorder (ADD). Further, he stated that the Dyslexia Center diagnosed him with dyslexia

and the diagnosis "really came out" while he was at Nicholls State University between 1998 and 1999. (Tr. 98).

Since leaving the ninth grade, Claimant has worked a number of jobs. He was employed by Swafco as a roustabout in the oilfields. He was employed as a "tire man" by Goodyear and then he worked as a tacker and welder at Delta Shipyard. (Tr. 99-101). He worked as a welder at Thibodaux Boiler Works (TBW) and testified that he took a test while employed there, but he was not certain whether he became certified as a welder. (Tr. 101). Claimant then worked at Fluor Daniels, at a Monsanto plant, and a Union Carbide plant. (Tr. 101-102).

Claimant began working as a welder at Avondale in 1985. He had already undergone two surgeries to his right knee which were performed by Dr. Eroche.[3] (Tr. 102-103). Claimant's first accident at Avondale was an injury to his right shoulder on November 5, 1990, which occurred when Claimant "popped [his] shoulder when putting lead down." (Tr. 104). Claimant underwent treatment for the shoulder injury, but testified he experienced shoulder problems "as soon as the treatments would stop." He testified the shoulder began hurting again while he was employed in the Employer's Return-to-Work Rehabilitation Program (RWRP) after injuring his knee, but he could not pinpoint an exact event or time.[4] (Tr. 82). Dr. Del Walker treated Claimant for the shoulder injury, and performed surgery on Claimant's shoulder. Claimant was last treated by Dr. Walker around 1996 or 1997. (Tr. 105).

Claimant continues to suffer from back problems, as well as ongoing popping and aching in his shoulder. The shoulder problems have been ongoing since Dr. Walker performed surgery in 1996. Claimant testified that Dr. Maki wants to do surgery as well. In reference to his ongoing knee problems, Claimant stated that the "bone just hurts" and that "it feels like something wants to come out from under the kneecap" when he bends his leg. (Tr. 88). He walks with a cane, which he testified was prescribed by Dr. Maki. (Tr. 96-97).

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[3] Claimant injured his right knee when he fell off a defective ladder at TBW. Avondale required Claimant to provide papers from Dr. Eroche stating the extent of his knee disabilities. (Tr. 103).

[4] Claimant's job duties with the RWRP included "putting stuff up on the upper level of the building as a storage area." He was "throwing stuff up to the guy up there" when his shoulder began hurting again. (Tr. 82). An accident report dated September 18, 1995, states Claimant felt pain in his right shoulder when "taking boxes on and off shelves." (EX-1, p. 38).

Dr. Maki became Claimant's treating physician following the right knee injury. Claimant underwent surgery to his right knee in early 1995, and then went back to work in Avondale's RWRP Program. (Tr. 108). He was employed as a small tool repairman in the RWRP Program at Avondale from July 25, 1995 through November 25, 1995. (Tr. 106-107) In November 1995, Claimant went back to work as a welder. (Tr. 107). He attended welding school, but standing all day caused problems with his knee and "holding the gun in order to run the machine" caused problems with his shoulder. (Tr. 83). He was earning $12.95 an hour as a welder and received a raise to $13.03 an hour. Claimant's earnings at that time were more than his earnings at the time of his injury. (Tr. 107-108). Claimant stopped working in July 1996. (Tr. 107).

Claimant has not worked since leaving Avondale in 1996, nor has he tried to go back to work since that time. Claimant testified that he has not worked since 1996 because he does not think anyone would hire him with his disabilities and that he could not sustain "gainful employment" because he would have to miss work three to four days a week. (Tr. 108-109).

Although he does not work, Claimant spends time researching and repairing computers. (Tr. 109). Claimant completed a computer training course and is trying to teach himself about computers with the goal of going to work repairing and working with computers[5]. (Tr. 109). Claimant uses components of old computers to make good computers. He works on computers at home, as he can, and will spend approximately four hours each day doing so. (Tr. 110).

In addition to computer repair, Claimant tries "to do stuff around the house," either watching his granddaughter or helping his wife. (Tr. 109, 115). Claimant put up fences around his home and has helped with the care of his mother-in-law and father-in-law. (Tr. 116). His wife is a "case manager" and he drives her to her appointments with clients in Thibodaux, Houma, Chackbay, Convent, Reserve, LaPlace, Gramercy, Vacherie, and Manchac, Louisiana. (Tr. 117-118). Claimant approximated that he drives his wife to between ten to fifteen appointments every three months. (Tr. 121).

Claimant does not recall the date of his last visit to Dr. Katz, but Dr. Katz prescribed "the injections" at that visit.

[5] Claimant also testified that he took an EMT training course, but he did not receive a certificate. (Tr. 115).

(Tr. 122). Claimant saw Dr. Taylor one time in 1997 because Louisiana Rehab sent him there. (Tr. 122). Presently, Dr. Maki is Claimant's treating physician. Dr. Maki is treating Claimant for his shoulder, knee, and back injuries sustained while working at Avondale. (Tr. 106). Claimant testified that he saw Dr. Maki for injections between one and two months prior to the formal hearing, and he is awaiting surgery. (Tr. 121-122).

Claimant was prescribed Tylenol 3 and Zoloft, but currently he only takes "Tylenol over-the-counter arthritis." (Tr. 123).

Nancy T. Favaloro

Ms. Favaloro was accepted as an expert in the field of vocational rehabilitation counseling. (Tr. 135). Ms. Favaloro has been working on Claimant's case at the request of Employer since 1996, for the purpose of determining the "employability of someone with the skills, abilities, and work restrictions" of Claimant. (Tr. 23-24).

On September 3, 1996, Ms. Favaloro met with Claimant. She conducted vocational testing, performed a transferable skills analysis, and reviewed all medical information. (Tr. 23; EX-2, p. 4). Ms. Favaloro testified that Claimant's transferable skills are his ability to apply principles of rational thinking to solve problems, his ability to apply common sense and understanding to carry out detailed instruction, and his ability to use a variety of tools and operate equipment. (Tr. 52-53). Periodically she has completed labor market surveys which she submitted for physician approval; she reviewed additional medical information as it became available. (Tr. 23-24). The jobs identified through the labor market surveys were not presented to Claimant and the reports generally did not include the names or addresses of potential employers. (Tr. 24-25).

In September 1996, Ms. Favaloro conducted a labor market survey of the Vacherie, Louisiana area. The survey was based on the restrictions imposed by the 1996 Functional Capacity Evaluation (FCE), which indicated that Claimant was able to frequently stand and walk. (EX-2, p. 6). The jobs identified by Ms. Favaloro also satisfy the restrictions set forth by Claimant's doctors. In a report dated August 6, 1996, Dr. Maki noted that Claimant should not do activities that involve climbing, deep-knee bending, and pivoting. Dr. Maki indicated Claimant could do medium grade activities. (EX-2, p. 6). On August 16, 1996, Dr. Murphy placed the following restrictions on Claimant: no overhead work or climbing, no heavy lifting or

significant repetitive lifting using the right upper extremity, no significant walking, no "long" standing, and no squatting. (EX-2, p. 6).

On October 1, 1996, Ms. Favaloro completed the first Vocational Rehabilitation Report, including the labor market survey which identified six potential jobs in or near Vacherie, Louisiana. (Tr. 25; EX-2, p. 6) The positions described in the October 1996 report were not submitted for approval to any of Claimant's physicians at the time. (Tr. 36; EX-2, p. 5). The following jobs were identified in the October 1996 report[6]:

1) an unarmed security guard with Vinson Guard Service, which alternated sitting, standing, and walking.[7] Ms. Favaloro was not able to specify the distance or amount of time the employee would have to walk. The job paid minimum wage which increased to $4.75 per hour on October 1, 1996. (Tr. 25-27; EX-2, p. 6).

2) a route sales person for Frito-Lay. The job required two to three weeks of training and it was located in Houma, Louisiana. (Tr. 29; EX-2, p. 6). The sales person would lift and transport boxes into various stores using a two-wheeled dolly; the lifting would not exceed 40-pounds. The position did not involve overhead lifting. (Tr. 30-32; EX-2, p. 6). The job was approximately 40 hours per week, paying $400 per week plus a commission program. (Tr. 29; EX-2, p. 6).

3) a driver at Terrebonne General Hospital Medical Center. The employee would drive a multi-passenger van to transport individuals back and forth between the parking lot and hospital. The job required mostly sitting and paid between $5.00 and $6.00 per hour. (Tr. 32-33; EX-2, p. 6).

4) a photo lab worker at Peterson Studio and Imaging located in Houma, Louisiana. (Tr. 34). The position provided on-the-job training for processing, printing, and developing film. (EX-2, p. 6). The job did not involve lifting more than 15-pounds and it allowed for alternated

[6] The names of the potential employers were not included in the Vocational Rehabilitation Reports that Ms. Favaloro submitted to Employer. The names of the potential employers were obtained by Claimant's counsel during direct examination of Ms. Favaloro.

[7] The record does not reflect the exact location of the job with Vinson Guard Service.

sitting, standing, and walking, which paid $4.75 as of October 1, 1996. (EX-2, p. 6).

5) an electronic assembler with Control General in Schriever, Louisiana. (Tr. 34). The worker would receive on-the-job training to assemble circuit boards and control systems. (Tr. 35; EX-2, p. 6). The job was sedentary and the worker could alternate sitting, standing, and walking. The job paid $4.50 per hour, which would increase to $4.75 per hour on October 1, 1996. (EX-2, p. 6).

6) a delivery driver for Domino's Pizza in Thibodaux, Louisiana. (Tr. 35). The length of a shift varied from 4 hours to 6 hours to 8 hours. (Tr. 36). The job required getting in and out of a vehicle for deliveries. It paid $4.75 per hour after October 1, 1996, plus tips and mileage reimbursement. (EX-2, p. 6).

After reviewing updated medical information, Ms. Favaloro rendered a second Vocational Rehabilitation Report on March 29, 2000. Dr. Katz examined Claimant in July 1999, and his report indicated that Claimant was capable of "at least sedentary duties" and suggested another FCE. (EX-2, p. 9). On February 18, 2000, Dr. Maki placed Claimant under the restrictions of no climbing, no prolonged squatting, no repetitive bending, and no jumping or pivotal action with the right knee. Dr. Maki indicated that Claimant could tolerate frequent sitting, frequent standing, and frequent walking. (EX-2, p. 10).

The report generated on March 29, 2000, contained an updated labor market survey of the Vacherie, Louisiana area. Ms. Favaloro identified seven potential jobs for Claimant which were later submitted to Claimant's doctors for approval. (Tr. 37; EX-2, pp. 10-11). The following seven jobs were identified in the March 29, 2000 report:

1) a weigh station monitor employed by the State of Louisiana.[8] (Tr. 37-38; EX-2, p. 10). The job required the monitor to do mostly paperwork. In March 2000, the position did not require climbing. (Tr. 38-39). The monitor would alternately sit, stand, and walk. He would lift between five and ten pounds. The job paid $7.00 per hour. (EX-2, p. 10).

[8] The record does not reflect the exact location of the job with Vinson Guard Service.

2) a toll collector at a bridge in Donaldsonville, Louisiana. (Tr. 40). The position provided on-the-job training and the toll collector could alternately sit and stand. The toll collector would collect tolls with his left hand/arm. The job paid $1,292 per month, or $7.45 per hour. (EX-2, p. 10).

3) inside sales with Sears in Houma, Louisiana. This was a full-time job that did not require overhead lifting. (Tr. 40-41). The employee would assist customers with returns, answer questions, and operate a cash register. The job required standing and walking and lifting no more than 20-pounds. The position paid $5.75 per hour. (EX-2, p. 10).

4) a delivery driver with Domino's Pizza in Thibodaux, Louisiana. This was the same position described in the October 1996 report. (Tr. 41). In March 2000, the job paid $5.15 per hour plus $0.70 per delivery and tips. (EX-2, p. 11).

5) a photo lab worker at Wal-Mart.[9] The position provided on-the-job training to process, print, and develop film. The worker would alternately stand, walk, and sit. He would be required to lift between approximately 20 and 25 pounds.[10] (EX-2, p. 11). The job was 32-40 hours each week and it paid $5.90 per hour with a wage increase after 90 days. (Tr. 42; EX-2, p. 11).

6) an unarmed security guard for Pinkerton at a plant in Lockport, Louisiana. (Tr. 42). The guard would be seated, except he would be required to make 15 to 20 minute rounds once an hour. (EX-2, p. 11). The job was full-time and it paid $5.15 per hour to start. (Tr. 43; EX-2, p. 11). The wages could increase to $5.50 per hour or higher with an evaluation after ninety days. The worker would also receive annual raises. (EX-2, p. 11).

7) an unarmed security guard at a hospital.[11] The job required the guard to patrol the hospital and grounds by walking or riding in a cart. The guard would be able to

[9] The Wal-Mart in Houma and the Wal-Mart in Thibodaux both had openings for a photo lab worker. (Tr. 41).

[10] Ms. Favaloro testified that lifting 20-25 pounds is light level work, rather than sedentary work. (Tr. 42).

[11] The record does not reflect the exact location of the job with the hospital.

sit and/or stand during monitoring activities. No lifting was involved and he would not apprehend anyone. The job paid $5.50 per hour. (EX-2, p. 11).

Dr. Maki approved all seven jobs on April 10, 2000. (Tr. 43, 124; EX-2, pp. 13-15) Dr. Katz approved six of the seven jobs on April 11, 2000. Dr. Katz did not approve the delivery driver job. (Tr. 43, 124; EX-2, pp. 16-18).

Ms. Favaloro generated another report dated May 3, 2000. (EX-2, pp. 19-21). Ms. Favaloro testified that the seven jobs contained in the May 3, 2000, report were identical to the seven jobs identified in March 2000. Ms. Favaloro created the report in May 2000 to notify Ms. Pamela Deffner, an Avondale representative, that she received a response from the doctors. (Tr. 44).

On December 20, 2002, Ms. Favaloro performed another Vocational Rehabilitation Report with another labor market survey. (Tr. 44, EX-2, pp. 26-28). The report dated December 20, 2002, identified five jobs as a "representative sampling" of the available jobs for which Claimant was qualified. (Tr. 52). The following five jobs were identified in the December 2002 report:

1) a production technician with All-Fax, who would repair and refurbish fax machines. (Tr. 44). The location of the job was in St. Rose, Louisiana. The job itself did not require any travel. (Tr. 45-46). The worker would be provided a stool with a back and he could alternate sitting, standing, and walking. The lifting requirement was up to 25 pounds, with "occasional frequent lifting" of 5 to 10 pounds. The position required a worker with manual dexterity to use small tools when taking apart and putting together items.[12] The job paid $7.50 per hour with an increase to $8.00 per hour after 90 days. (EX-2, p. 27).

2) a driver for transportation of oilfield personnel. The prospective employer was Acadiana Crew Change. The company was located in Chacahoula, Louisiana, and the driver would be expected to cover a large area. The drivers would not drive more than six to eight hours in one day. (Tr. 46-47). The driver is seated while working and

[12] The vocational assessment did not include tests of manual dexterity, but Claimant's doctors did not indicate any restrictions in that area. (Tr. 45).

may stand and walk occasionally. The job paid $7.25 to $8.50 per hour. (EX-2, p. 27).

3) a portrait studio worker employed by PCA International at a location in Thibodaux, Louisiana. (Tr. 47). The position required occasional lifting of up to 25 pounds. (Tr. 48; EX-2, p. 27). The worker could alternate standing and walking while working, and could sit while selling portrait packages to customers. A wage quote was not given by the potential employer. Other locations pay $7.00 per hour plus bonuses; employees average $8.00 per hour. (EX-2, p. 27).

4) an optician for Wal-Mart at either the Houma or Thibodaux, Louisiana location. (Tr. 49). The position involved helping customers choose eyeglass frames, teaching customers how to clean and handle their lenses, and eyeglass repair. (Tr. 50; EX-2, pp. 27-28). The optician must be able to handle and grasp small items. The job allowed alternate standing and walking, and the worker was allowed frequent opportunities to sit. (Tr. 50; EX-2, p. 28). The position provided on-the-job training. (Tr. 50). Lifting would not exceed 10-pounds and the job paid $6.00 to $6.50 per hour. (EX-2, p. 28).

5) an unarmed security guard with Terrebonne General Hospital. The guard would patrol the parking lot in an automatic transmission vehicle and would watch the security monitors. The guards rotated positions every hour. (Tr. 51; EX-2, p. 28). The job allowed alternated sitting, standing, and walking; it did not require heavy lifting.[13] (EX-2, p. 28). The job was a full-time position that paid $6.00 to $7.00 per hour. (Tr. 51; EX-2, p. 28).

On December 20, 2002, Dr. Katz and Dr. Maki approved all five jobs that were identified in the December 2002 labor market survey. (Tr. 125; EX-2, pp. 22-25). On January 27, 2003, Ms. Favaloro submitted the five job descriptions to Dr. Walker, who approved the jobs based on Claimant's condition when Dr. Walker last examined him in 1996. (Tr. 125-126; EX-2, pp. 30-31).

Ms. Favaloro also generated a Vocational Rehabilitation Report on February 5, 2003. (EX-2, pp. 33-34). Ms. Favaloro testified the purpose of the February 2003 report was to note

[13] Ms. Favaloro testified that the maximum amount of lifting would be 20 pounds, although an amount is not indicated in the job description provided with the Vocational Rehabilitation Report. (Tr. 51; EX-2, p. 28).

that Claimant had been in Avondale's RWRP Program from July 24, 1995 through November 25, 1995.[14] During his employment with RWRP, Claimant earned $6.38 per hour. A description of Claimant's job with RWRP indicated that it fell within Claimant's work restrictions. (Tr. 55). The job title was "Small Tool Repairman Trainee" and Claimant was allowed to sit or stand to complete his duties. The job did not require lifting more than twenty pounds, and a lifting restriction of five or ten pounds would be accommodated. The position was approved by Dr. Katz on February 12, 2003. (Tr. 126; EX-2, p. 35). Ms. Favaloro further testified that her report indicated Claimant left RWRP on November 25, 1995, and returned to his regular department as a welder, earning $12.59 per hour. (Tr. 55). Nonetheless, Claimant could have continued to work in the RWRP Program and that job remained "open and available" to him. (Tr. 127).

Ms. Favaloro compiled another Vocational Rehabilitation Report on November 24, 2003. At the time of the report, Dr. Maki set Claimant's work restrictions at light work with lifting to a 20 pound maximum, frequent lifting/carrying of up to 10 pounds, and limited overhead lifting. (EX-2, p. 36). The labor market survey done in conjunction with the November 2003 report identified nine jobs.[15] The nine jobs are as follows:

> 1) a production technician with All-Fax. This is the same position that was identified in the December 2002 report. The position required lifting boxes that weighed up to 20 pounds and transporting the boxes between rooms on a dolly.[16] (Tr. 56-57; EX-2, p. 36). The job paid $7.50 per hour with an increase of $0.50 per hour after 90 days. (EX-2, p. 36).
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> 2) a driver with Acadiana Crew Change which required a CDL passengers license, if hired. (Tr. 57-58). The job was sedentary with no lifting, but it allowed standing and walking on occasion. The job paid between $7.25 and $9.00 per hour. (EX-2, p. 37).

[14] The RWRP allows injured or ill Avondale employees to pursue some kind of employment with the company, if an employee's condition does not permit him return to his regular job. (Tr. 55-56).

[15] These jobs were not submitted to the doctors for approval at that time because the medical depositions had not been taken. (Tr. 128).

[16] The record does not indicate how many boxes would be moved at one time or the total weight of the boxes.

3) an unarmed guard/dispatcher with Wilco in Houma, Louisiana. Although the job did not require lifting of more than 10 pounds, it was not a sedentary position because the guard was required to walk around the yard every hour. (Tr. 59). The job allowed the guard to alternately sit, stand, and walk. The job paid $6.50 per hour. (EX-2, p. 37).

4) a photo lab worker for Qualex at the Target in Houma, Louisiana. (Tr. 60). The worker would operate a photo processing machine to process, print, and develop film. On-the-job training was provided. (EX-2, p. 37). The worker would mostly stand and walk, but would be allowed to sit during slow periods; the lifting requirement was 10 pounds with a 20 pound requirement once a month. (Tr. 61). The job paid between $6.50 and $7.50 per hour. (EX-2, p. 37).

5) a dispatcher for Acme Truck Line in Houma, Louisiana. (Tr. 61). The position was a basic sedentary job that did not require more than 10 to 15 pounds of lifting. (Tr. 61; EX-2, p. 37). It was a full-time position that paid minimum wage with an increase to $5.75 per hour after three to six months. (Tr. 62; EX-2, p. 37).

6) a box folder for Motivatit, a seafood company in Houma, Louisiana. (Tr. 62). The job required the worker to fold and assemble empty boxes while seated. (EX-2, p. 37). It entailed repetitive use of the hands and arms, but the lifting requirement did not exceed two pounds and there was no overhead work. (Tr. 62). The job paid $5.50 per hour. (EX-2, p. 37).

7) an answering service operator with Superior Answering Service in Thibodaux, Louisiana. (Tr. 63). The position was sedentary with a five-pound limit on lifting. The job paid $6.00 per hour. (Tr. 63; EX-2, p. 38).

8) an information clerk at Southland Mall in Houma, Louisiana. The position was sedentary. The clerk's duties mostly involved paperwork, but he would have to push a stroller or cart if someone was renting one. (Tr. 64). The lifting requirement was 5 to 10 pounds. The job paid $6.00 per hour. (Tr. 64; EX-2, p. 38).

9) a cashier position at Terrebonne Ford.[17] (Tr. 65). The job was sedentary and the employee could alternately stand and walk as needed. The lifting requirement was less than 20 pounds. The job paid $7.00 per hour. (EX-2, p. 38).

On March 24, 2004, Ms. Favaloro generated a Vocational Rehabilitation Report, including a labor market survey that identified eleven jobs within Claimant's qualifications and work restrictions. (Tr. 65; EX-2, p. 40). Before she performed the labor market survey, Ms. Favaloro reviewed Claimant's updated medical records. The restrictions used for her report are as follows, as recommended by Dr. Maki's records and deposition: light work with lifting of 20 pounds maximum and frequent lifting and/or carrying of objects weighing up to 10 pounds, walking or standing most of the time with a degree of pushing/pulling of arms and/or leg controls, limited overhead work activities, and light to medium work as long as there is no prolonged squatting or crawling. (EX-2, p. 40).

Using the work restrictions set forth by Dr. Maki, Ms. Favaloro identified the following eleven jobs in her report dated March 24, 2004:

1) a route salesperson with Schwan Food Company, located in Thibodaux, Louisiana. (Tr. 66). The position involved driving an automatic box truck. (Tr. 66; EX-2, p. 41). The job required occasional lifting of up to 30 pounds and the employer would provide a dolly if needed. The salesperson could alternately sit, stand, and walk. No overhead lifting was involved. (EX-2, p. 41). The job was full-time and it paid approximately $30,000.00 per year, with a potential increase after the first year. (Tr. 66; EX-2, p. 41).

2) a cashier at the Home Depot in Houma, Louisiana. (Tr. 69). The position required occasional lifting of up to 40 pounds. The cashier would mostly be standing or walking during the full-time shift, but he could sit during lunch or break periods. (Tr. 69-71; EX-2, p. 41). The job paid between $7.50 and $8.00 per hour. (EX-2, p. 41).

3) a service advisor at Barker GMC in Houma, Louisiana. (Tr. 71-72). He would write down the services needed and would be trained to enter that information into

[17] The record does not reflect the location of the job with Terrebonne Ford.

a computer. (Tr. 72). The position required interpersonal skills because of interaction with the public. (Tr. 72-73). The service advisor would alternately sit, stand, and walk. There was occasional lifting of 15 to 20 pounds and no overhead work. (EX-2, p. 42). The job paid in the "mid-thirty thousand range" and was commission based. (Tr. 72; EX-2, p. 42).

4) a Bridge Operator I through the Terrebonne Parish Department of Transportation. (Tr. 73). The job was located in Houma, Louisiana. (EX-2, p. 42). The operator would operate bridge controls and record the names and types of vessels that pass through. (EX-2, p. 42). The job allowed alternate sitting, standing, and walking. The operator would rarely lift 40 pounds, but would be required to push a lawnmower to cut grass. (Tr. 74-75; EX-2, p. 42). The job did not require overhead work; the operator would have to climb eight to ten stairs to get to the workstation. The position paid a minimum hourly wage of $8.27 per hour. (EX-2, p. 42).

5) an unarmed security guard at Terrebonne General Hospital. This is the same position identified in the December 2002 report. (Tr. 75). The job paid $8.00 per hour. (EX-2, p. 42).

6) an answering service operator for Superior Answering Service.[18] (Tr. 76; EX-2, p. 42). The job was a sedentary position with the opportunity to stand and walk as needed. The lifting requirement was less than five pounds. The position paid $6.00 per hour. (EX-2, p. 42).

7) a delivery driver for Papa John's in Houma, Louisiana. (Tr. 77). The job required alternate sitting, standing, and walking. (EX-2, p. 42). The lifting requirement was between 10 and 20 pounds. (Tr. 77; EX-2, p. 42). The job paid minimum wage plus $0.75 per delivery, plus tips. The drivers average $7.00 to $8.00 per hour. (EX-2, p. 42).

8) a photo lab worker for Qualex at Target.[19] (Tr. 78). The heaviest lifting required for the position was

[18] The record does not reflect the exact location of the job with Superior Answering Service.

[19] This job had been previously identified in Ms. Favaloro's November 2003 report. (Tr. 78).

between 20 and 25 pounds, one time each month. The job paid between $6.50 and $7.00 per hour. (EX-2, p. 43).

9) a guard/dispatcher for Wilco.[20] (Tr. 78). The employee would alternately sit, stand, and walk. It did not require lifting of more than 10 pounds. The job paid $6.50 per hour. (EX-2, p. 43).

10) a driver for Acadiana Crew Change.[21] (Tr. 78). The position paid between $8.50 and $9.00 per hour. (EX-2, p. 43).

11) an assembler for All-Fax. (Tr. 78). It required the use of small handtools to perform repetitive assembly work on various products. The job required occasional lifting of 20 pounds. The assembler may stand for three to five hours during a shift, but may sit at various times to operate machinery. The job did not involve overhead work. The job paid $7.50 per hour and the amount was increased to $8.00 per hour after ninety days. (EX-2, p. 43).

On March 26, 2004, Dr. Maki approved all eleven jobs identified by Ms. Favaloro in the report dated March 24, 2004. (Tr. 128; EX-2, pp. 49-52). On April 5, 2004, Dr. Katz approved ten of the eleven jobs identified in the report of March 24, 2004. Dr. Katz did not approve the "route salesperson" position with Schwan Food Company. (Tr. 129; EX-2, pp. 45-48).

On March 31, 2004, Ms. Favaloro generated another Vocational Rehabilitation Report. Ms. Favaloro reviewed the updated medical records from Dr. Maki. She noted that Dr. Maki suggested sedentary work for Claimant as of February 27, 2004.[22] (EX-2, p. 53). The labor market survey identified the following two jobs that were consistent with a sedentary physical demand level:

1) a cashier/checker a Piccadilly in Houma, Louisiana. (Tr. 79). The employee would be trained to operate a cash register. A stool was provided, so the employee could alternately sit or stand. The employee would not lift more

[20] This job had been previously identified in Ms. Favaloro's November 2003 report. (Tr. 78).
[21] This job had been previously identified in Ms. Favaloro's November 2003 report. (Tr. 78).
[22] Ms. Favaloro also noted that Dr. Maki indicated, in his deposition of January 27, 2004, that Claimant could perform medium work with a lifting restriction of 50-pounds, no overhead work, and no crawling. (EX-2, p. 53).

than 10 pounds. The job paid $6.00 per hour. (EX-2, p. 53).

2) a satellite sales representative for Mobiletel. The company has various locations in stores and malls in the Houma/Thibodaux, Louisiana area. (Tr. 79; EX-2, p. 54). A stool would be provided and the sales representative could sit for the majority of the day. (Tr. 80; EX-2, p. 54). The lifting requirement was less than 15 pounds and no overhead work was involved. The position paid $6.50 per hour. (EX-2, p. 54).

The jobs identified in the report dated March 31, 2004, were not submitted to the doctors for approval. (Tr. 129).

Ms. Favaloro testified that since July 1996 to the present, there has been suitable alternative employment available to Claimant on a regular basis. She stated that these jobs have generally paid slightly above minimum wage to much more than minimum wage. (Tr. 131). Based on her review of the medical records and her meeting with Claimant, Ms. Favaloro stated that she does not see a reason why Claimant could not currently be employed.[23] (Tr. 133).

The Medical Evidence

Dr. Arthur Delmar Walker, Jr.

Dr. Walker, a board-certified orthopedic surgeon, was deposed by the parties on June 18, 2003. (EX-22). Dr. Walker treated Claimant from November 22, 1995 through August 5, 1996, for an injury to his right shoulder. Claimant indicated that he first injured his right shoulder in late December 1990 while working at Avondale. He was treated with conservative care by the company doctor, Dr. Mabey. Claimant had continued on regular work since the injury in 1990 and Claimant's complaints were limited to his right shoulder at the time of the examination. Claimant felt his symptoms justified further treatment. (EX-22, pp. 6-7).

On November 22, 1995, Dr. Walker performed a physical examination of Claimant which revealed localized tenderness over the shoulder, full range of motion, and a positive impingement sign. Claimant felt pain along the anterior and lateral aspect

[23] Ms. Favaloro testified that she did not review any medical records pertaining to Claimant's psychological state. (Tr. 143)

of the shoulder when he extended his arm and internally rotated his shoulder. Dr. Walker noted a grinding sensation on the right side. Claimant had good stability of the shoulder. (EX-22, pp. 8-9). Dr. Walker took X-rays of Claimant's shoulder which revealed mild degenerative changes with "early bone spur formation." He considered his findings normal for Claimant's age group and opined the X-rays did not show any type of work-related injury. (EX-22, p. 9). Dr. Walker suggested Claimant suffered from pain chronic in nature consistent with chronic tendonitis of the shoulder, which can be caused by many things including trauma and overuse in day-to-day activities, but noted that five years after onset it was "difficult to say." Claimant related no other precipitating cause for his symptoms. (EX-22, p. 10). Dr. Walker recommended a reduced work activity level for Claimant, specifically no lifting or handling objects weighing more than 40 pounds. He also suggested Claimant avoid overhead work or climbing. (EX-22, p. 11).

On December 12, 1995, Claimant underwent an arthrogram which involved injecting dye into the shoulder joint. The arthrogram showed no signs of a rotator cuff tear and Dr. Walker diagnosed Claimant with tendonitis of the shoulder and impingement syndrome.[24] After reviewing the types of conservative care Claimant had received in the previous years, Dr. Walker performed a "decompression of the shoulder" on January 30, 1996, which involved "removal of the ligament and any bony structures that we find impinging or irritating the underlying rotator cuff at the time of surgery." (EX-22, pp. 14-15). Dr. Walker anticipated a three to four month recovery time. (EX-22, pp. 16-18).

On April 4, 1996, Claimant complained of pain in his right shoulder while lifting five pounds during his physical therapy sessions. (EX-13, p. 9). Dr. Walker released Claimant to light-duty work with no lifting objects over 30 pounds and suggested three more weeks of physical therapy. (EX-22, p. 20).

On April 25, 1996, Claimant complained of a popping sensation in his shoulder, which Dr. Walker attributed to the normal development of scar tissue which he felt would improve with time. For the first time, Claimant was ambulating with a cane and had complaints of right knee problems, for which Dr. Walker was not treating Claimant. Dr. Walker expressed concerns about Claimant's motivation and effort. (EX-22, pp. 22-24).

[24] At his deposition, Dr. Walker stated that this condition can be chronic if not adequately treated. (EX-22, p. 13).

Dr. Walker recommended continued light-duty work pending a FCE. (EX-22, p. 26). Following a review of the FCE on July 16, 1996, Dr. Walker indicated Claimant could return to medium job activity and had reached maximum medical improvement for his shoulder condition. The FCE found signs of exaggeration and lack of effort which were consistent with Dr. Walker's concerns. (EX-22, pp. 26-28).

On August 5, 1996, Dr. Walker examined Claimant and found full range of motion of the shoulder with some grinding at the surgical site. Claimant had good muscle tone and normal muscle strength. X-rays showed no signs of soft tissue calcification and there were no unusual post-operative findings. (EX-22, pp. 29-30).

At his deposition, Dr. Walker stated that he was not aware of any reason that Claimant's shoulder should prevent him from returning to work. (EX-22, p. 30). Dr. Walker was not asked to assign a functional impairment rating to Claimant's shoulder, but at the deposition he opined that it would be between 10% and 20% of the upper extremity. (EX-22, p. 32).

Dr. George A. Murphy

On August 16, 1996, Claimant was examined by Dr. Murphy, an orthopaedic surgeon whose credentials are absent from the record. Claimant was examined by Dr. Murphy at the request of the U. S. Department of Labor (DOL). Claimant complained of right shoulder pain during activity and a "catching sensation" at times, despite the earlier surgery. A physical examination of Claimant revealed a "defect at the end of the clavicle from the resection of the distal clavicle at the AC joint." Claimant had full motion of the shoulder, but complained of pain in extreme abduction and rotation. Dr. Murphy found slight crepitation and no major catching. (CX-4, p. 6). Dr. Murphy recommended an exercise program for strengthening, limitations on overhead work or climbing, and no heavy lifting or repetitive lifting with the right upper extremity. Id. Dr. Murphy assigned a disability rating of 10% to Claimant's right shoulder, which he changed to a 15% impairment on September 30, 1996. (CX-4, pp. 4, 7).

As to Claimant's right knee, Dr. Murphy found no effusion and no major instability. He opined Claimant suffered from mild chondromalacia of the knee. (CX-4, p. 2). Dr. Murphy suggested Claimant already had arthritis to the medial compartment because of the surgery in the early 1980s. He suggested that the injury

in 1995 aggravated the pre-existing problems, which he noted were "chondromalacia of the patella and torn degenerative medial meniscus with degenerative arthritis of the medial compartment." Id. Dr. Murphy recommended arthritis medications, knee support, strengthening through quadriceps exercises, and modified activities. He opined Claimant was suited for light sedentary activities with no climbing, no significant walking, no "long" standing, no squatting, and no heavy lifting. He opined that eventually Claimant will require knee replacement surgery. Dr. Murphy did not assign a disability rating to Claimant's knee, but noted no significant difference between the disability from before and after the 1995 injury. He opined there would be an increased disability of 5% to 10%. Id.

On September 10, 1997, apparently at the request of an attorney, August Gomez, Dr. Murphy re-examined Claimant, who complained of back trouble since his right knee gave out and more catching in his right shoulder after his last exam. Dr. Murphy found good motion in the shoulder, but more significant crepitation than at his last exam. He noted Claimant experienced tenderness in the right knee and slight crepitation on motion of the knee. Dr. Murphy suggested sedentary level activities for Claimant which is a permanent assignment. (CX-4, p. 5).

On September 30, 1996, Dr. Murphy reviewed Claimant's past operative reports and opined that he had a 15% impairment to the upper extremity as a result of a shoulder injury. He further opined that the degree of disability for Claimant's right knee was the "same from before and after the surgery since there seems mostly to have been an aggravation of all the pre-existing problems in the knee." (EX-8, p. 5).

On January 19, 1998, Dr. Murphy gave Claimant a prescription for a motorized scooter. (CX-4, p. 3). On February 22, 2000, Dr. Murphy noted Claimant experienced continued problems with his knee and shoulder. In addition, Dr. Murphy reviewed an MRI scan of Claimant's lower back which revealed a bulging disc. He did not provide a medical opinion as to causation for the back pain. Again, Dr. Murphy suggested sedentary work for Claimant. (CX-4, p. 1).

Dr. Neil J. Maki

Dr. Maki, a board-certified orthopedic surgeon, was deposed by the parties on February 11, 2003, and on January 27, 2004. (EX-25; EX-25a). Dr. Maki first treated Claimant in 1981 for an

injury to his left knee. (EX-25; p. 6). In 1982, Dr. Maki treated Claimant for an injury to his right knee sustained when Claimant fell from a ladder while working at TBW. (EX-25, pp. 6-7). X-rays of Claimant's right knee were normal, but indicated some "lateral tilt or displacement of the patella," which Dr. Maki diagnosed as a contusion of the right knee. (EX-25, p. 7). On June 24, 1982, Dr. Maki performed an arthroscopy of the right knee. Claimant had "an excision over the tear to the medial meniscus and an incision of the medial plica." (EX-25, p. 7). Dr. Maki continued to treat Claimant until January 3, 1983. (EX-25, p. 8).

On April 3, 1995, Dr. Maki treated Claimant for a right knee injury sustained on March 9, 1995. (EX-25, p. 8). Dr. Maki found no swelling of the knee, although Claimant complained of tenderness on the "medial aspect" of the knee. The knee was stable and Claimant had full motion. Dr. Maki indicated the X-rays were normal, but showed "some mild narrowing of the joint line on the right knee." Dr. Maki felt there was some mild osteoarthritis with a possible re-tearing of the remnants of the medial meniscus. (EX-25, p. 8).

On May 22, 1995, Dr. Maki performed an arthroscopy of Claimant's right knee, with a partial medial meniscectomy and a debridement of the knee. (EX-25, p. 9). Dr. Maki found some arthritic change and diagnosed Claimant as having "chondromalacia patella" of the right knee. Following the surgery, Claimant continued to complain of pain, especially "around the portal side." Dr. Maki stated Claimant regained full motion, the knee was stable, and there was no swelling. (EX-25, p. 9).

Dr. Maki had discussions with Claimant about returning to work under the restrictions of no climbing or crawling. (EX-25, p. 9). On August 11, 1995, Claimant informed Dr. Maki that he was doing light work with no problems. Dr. Maki indicated Claimant would have a 10% to 15% permanent total functional impairment of the knee due to the arthritic change and the meniscal change. Dr. Maki further indicated that some of the impairment was pre-existing, ultimately attributing two-thirds of the impairment to Claimant's previous condition, notably the two prior surgeries on the knee.[25] At an October 13, 1995 visit, Claimant complained of pain about his right shoulder which Dr.

[25] On October 27, 1995, Dr. Maki assigned one-half of the impairment (7.5%) to the pre-existing injury. (EX-3, p. 18). During his deposition, Dr. Maki stated that in retrospect he would assign two-thirds of the impairment to the pre-existing injury. (EX-25, pp. 10-11).

Maki opined was early rotator cuff disease. (EX-25, p. 10). On October 27, 1995, Claimant expressed to Dr. Maki that he wanted to return to regular work as a welder, and Dr. Maki opined that Claimant was performing moderate duty work by December 1995. (EX-25, p. 11).

On December 22, 1995, Claimant complained of pain in the anterior aspect of his knee and indicated that he was experiencing shoulder problems that interfered with his work activities.[26] (EX-25, p. 11).

On August 6, 1996, Claimant needed modifications in his work activities. Dr. Maki suggested a reduction to medium grade activities with no climbing, no deep-knee bending, and no pivoting. At his deposition, Dr. Maki pointed out that Claimant was initially released to light duty work and then to full duty work before Claimant was placed under moderate grade work restrictions in August 1996. (EX-25, pp. 12-13). Dr. Maki adjusted the work restrictions based on Claimant's complaints. At that time, Claimant was receiving physical therapy with Mr. Dee Adams pursuant to Dr. Maki's recommendation. (EX-25, p. 13). Dr. Maki's report does not record Claimant's July 1998 fall and subsequent back complaints.

On September 25, 1996, Claimant returned to Dr. Maki with complaints of "diffused pain." Claimant indicated he was having difficulty doing his job. Dr. Maki then increased the work restrictions to "light sedentary duty" in an effort to "get him to continue working." Dr. Maki indicated that the increased work restrictions stemmed primarily from the complaints of pain, but he noted that Claimant had arthritic changes in his knee which would cause pain during certain activities. (EX-25, p. 14).

Dr. Maki continued treating Claimant throughout 1996 and into 2001. On November 25, 1996, Dr. Maki agreed with Dr. Murphy's assessment that Claimant was capable of sedentary to light duty work. He informed Claimant that he needed authorization to evaluate his complaints of shoulder and back problems. (EX-3, p. 20). On February 28, 1997, Dr. Maki suggested Claimant go to Chabert Hospital for an evaluation of any back problems. (EX-3, p. 21).

On January 17, 2000, Dr. Maki performed another arthroscopy

[26] On March 15, 1996, Dr. Maki noted that Claimant was recovering from shoulder surgery, but Dr. Maki's treatment was limited to the knee at that time. (EX-25, pp. 11-12).

on Claimant's right knee. The arthroscopy revealed mostly arthritic changes and some "retearing of the medial meniscus," which were expected findings. On subsequent visits, Claimant continued to complain of pain, but his knee remained in good condition. The knee was stable with full motion and no swelling. (EX-25, p. 15). In a report dated February 18, 2000, Dr. Maki opined that Claimant would achieve maximum medical improvement (MMI) in "at least three months." (EX-3, p. 23). On February 23, 2000, Dr. Maki assigned a 20% functional impairment to Claimant's right lower extremity. (EX-25, p. 15; EX-3, p. 23).

In May 2000 and June 2000, Claimant received three Synvisc injections in his right knee, which ultimately did not provide any significant benefit. (CX-1, pp. 14-15). On May 2, 2000, Dr. Maki placed Claimant at MMI as of February 23, 2000. (CX-1, p. 23).

On June 29, 2001, Claimant complained of pain and "giving way of his right knee." Dr. Maki stated the knee was stable with full motion and no effusion. Dr. Maki did not believe Claimant would benefit from further surgery at that time. (EX-25, p. 15). On June 29, 2001, Dr. Maki indicated Claimant could not likely return to "gainful employment." (EX-3, p. 26). During the 2003 deposition, Dr. Maki clarified that statement, opining that Claimant could return to gainful employment if "he had the opportunity and the motivation" and was subject to activity restrictions. (EX-25, p. 17). He opined Claimant could return to work as a welder with restrictions of occasional squatting, no climbing on ladders or scaffolds, and being allowed the opportunity to sit. Id. Dr. Maki indicated Claimant experienced some arthritic changes in his knee which would slowly progress over time. (EX-25, pp. 17-18).

At his February 11, 2003 deposition, Dr. Maki testified that he may have given Claimant a prescription for a power scooter at Claimant's request. However, Dr. Maki stated Claimant is "not that disabled." (EX-25, p. 20). Dr. Maki further testified that he would currently allow Claimant to engage in occasional squatting, stooping, and stair climbing. He suggested Claimant should avoid climbing ladders and scaffolding for safety because his knee could give out. He further stated that bending and extended sitting should not be a problem for Claimant, and Claimant could stand for three to four hours without a problem. He stated if Claimant were to constantly alternate from sitting to standing to sitting, this position changing should not be a specific problem for him;

however, the weight shifting could cause some pain. (EX-25, pp. 20-22). These restrictions were based on Claimant's complaints, but Dr. Maki noted the complaints were somewhat expected since Claimant had several surgeries on his knee. (EX-25, pp. 23-24). Dr. Maki opined that Claimant's knee condition could cause him pain which could cause his knee to give way or cause Claimant to fall. (EX-25, p. 25).

On September 16, 2003, Claimant began treatment with Dr. Maki for pain in his right shoulder, both knees, and lower back. (EX-25a, pp. 6-8). Through a patient history, Claimant informed Dr. Maki that these injuries were related to the accident on March 9, 1995, and he had an old injury to the "acromial clavicular [AC] joint of his right shoulder." Dr. Maki was aware that Claimant had past problems with his shoulder. (EX-25a, pp. 8-10, 44-46). A physical examination revealed Claimant had a stable knee with "motion of the knee." Claimant also had full motion over the AC shoulder joint and the shoulder girdle was stable. Dr. Maki did not find any abnormalities in Claimant's back exam.[27] (EX-25a, pp. 12-13). Claimant underwent X-rays which revealed minimal arthritic change in the right knee and in the lumbar spine. The shoulder X-rays showed the previous AC joint resection. (EX-25a, pp. 13-14). Dr. Maki opined Claimant suffered from "residual pain; possibly some adhesions about his right shoulder; that he had some arthritic changes in his lumbar spine; and, soft tissue strain about his right shoulder and lumbar spine." Id. Dr. Maki recommended conservative care for Claimant's back and planned to "follow" Claimant for his knees. Dr. Maki ordered an MRI of the right shoulder and tentatively scheduled him for "an arthroscopy with debridement of the right shoulder and to further resect the AC joint lysis of adhesions." (CX-1, p. 42). During the January 2004 deposition, Dr. Maki opined that Claimant did not suffer from a significant back problem, other than a back strain and arthritic change which would be common in someone who is forty to fifty years old. (EX-25a, p. 15). He further stated Claimant did not report that his knee gave out in 1998 causing him to hurt his back. (EX-25a, p. 65).

On September 22, 2003, Claimant underwent an MRI of his right shoulder and had a follow-up visit with Dr. Maki on September 30, 2003. (EX-25a, p. 16). The results of the MRI appeared normal and "relative" to the previous surgery. (EX-

[27] Mr. Bergeron underwent an MRI of his back in 1999 and Dr. Maki was asked to comment on the results of that MRI during his 2004 deposition. He found a "little bit of degenerative change at L5-S1 and L3-4 of the disk." It was otherwise unremarkable. (EX-25a, pp. 49-50).

25a, p. 28). The MRI showed evidence of "tendinous synovitis" and some changes of the rotator cuff that were common for Claimant's age group. The rotator cuff was intact and Claimant had "full motion and good strength of his shoulder." Dr. Maki noted some "crepitation, which is a grating sensation about the AC joint of his right shoulder" and some arthritic change about the AC joint. (EX-25a, p. 16). To remedy the crepitation, Dr. Maki suggested surgery to "resect" the AC joint and remove some scar tissue. (EX-25a, p. 17). He acknowledged that the need for surgery is based on Claimant's subjective complaints of pain. (EX-25a, p. 18).

On October 9, 2003, Claimant was examined by Dr. Zahrawi, an associate of Dr. Maki. Claimant complained of pain and tenderness around the scar on his right shoulder, as well as a clicking and grinding sensation in the right shoulder. (CX-1, p. 41; EX-25a, p. 27). Dr. Zahrawi examined Claimant's shoulder and found it functioning well with full passive motion of the shoulder and no muscle atrophy. (EX-25a, p. 26). Dr. Zahrawi recommended conservative care with the option of surgical debridement in the shoulder area. Dr. Zahrawi also signed a work status form that released Claimant to light duty work.[28] (EX-25a, p. 38). At the deposition, Dr. Maki agreed with Dr. Zahrawi's assessment of Claimant's work restrictions, but indicated that medium work restrictions would have been fine with limitations on crawling, squatting, overhead work, use of ladders, and hazardous places. (EX-25a, pp. 39-40).

On September 30, 2003, Dr. Maki ordered Claimant to undergo a bone scan to determine how the results would correlate to the pain complaints. (EX-3, p. 4). The bone scan showed a removal or absence of the distal clavical, but it did not show a "marked amount of increased uptake of isotope." This indicated that Claimant did not suffer from a bone problem or an acute inflammatory process. (EX-25a, pp. 28-29).

On October 24, 2003, Dr. Maki informed Claimant of the results of his bone scan. Claimant persisted in his complaints of shoulder pain about his surgical scar. Dr. Maki noted that scar tissue can cause pain and a resecting of the area could alleviate "a lot of his complaints." (EX-25a, pp. 27, 29). He

[28] The work status form defined "light work" as follows: "Lifting 20 pounds maximum with frequent lifting and/or carrying of objects weighing up to 10 pounds. A job is in this category when it requires walking or standing most of the time with a degree of pushing/pulling of arm and/or leg controls." (CX-1, p. 59).

further commented that adhesions and scarring may not be revealed on a bone scan, but that scarring would be expected after surgery; second surgeries usually cause more scarring than the first surgery. (EX-25a, p. 30). Dr. Maki opined that he did not have a high probability of making Claimant better with the shoulder surgery, "but maybe 50- to 60-, 70-percent of helping tenderness . . . and pain . . ." A recommendation for surgery is based on Claimant's subjective complaints of pain and not necessarily anything objective on the MRI or bone scan. (EX-25a, p. 31). Dr. Maki confirmed that he was of the opinion that Claimant had "some genuine pain." (EX-25a, p. 33). He further opined that because Claimant's pain and tenderness were localized, and basically the main area of complaint, shoulder surgery could help Claimant. (EX-25a, pp. 34, 61). On October 24, 2003, Dr. Maki informed Claimant that he would agree with the arthroscopy but could not guarantee a benefit from it. (EX-25a, pp. 27, 31-32).

Dr. Maki did not have objective findings as to any type of back injury, except that Claimant had some arthritic change on the X-ray. (EX-25a, pp. 34-35). He opined that Claimant's back complaints are related to a soft tissue strain or arthritic pain, but noted Claimant did not exhibit signs of a serious back injury. Dr. Maki further stated he did not find nerve root problems, reflex changes, or atrophy. (EX-25a, pp. 35-36). He recommended conservative care for Claimant's back complaints, including a back care program that demonstrates proper lifting techniques and back exercises for strengthening of muscles. (EX-25a, p. 41).

Dr. Maki's reports following September 16, 2003, do not reflect treatment of Claimant's right and left knees. During the January 2004 deposition, Dr. Maki indicated that knee exams and evaluations had been "done previously" and that there had not been any significant change. (EX-25a, p. 37). Dr. Maki would not recommend further treatment of Claimant's knees at the time of the deposition; however, he did predict that the arthritic changes in the knees may require Claimant to undergo knee joint replacement in the future. (EX-25a, p. 40).

On cross-examination, Dr. Maki affirmed that at the September 16, 2003 visit, Claimant attributed the March 1995 job injury as the cause of his back pain, but noted that when he treated Claimant in April 1995 for his work injury, the back injury was not part of Claimant's history. (EX-25a, pp. 42-43).

At the January 27, 2004, deposition, Dr. Maki stated Claimant was capable of light to medium duty work. He opined Claimant could stand or walk for four to six hours in an eight hour period, with the opportunity to sit for fifteen minutes every few hours. (EX-25a, pp. 58-59). In Dr. Maki's opinion, Claimant could work at a job that required walking, but not continuous walking. The work restrictions also included occasional stair climbing and no crawling. (EX-25a, p. 60).

On February 27, 2004, Dr. Maki performed two injections as recommended by Dr. Katz. One injection was made in Claimant's AC joint and the other was into the "subacromial space of the right shoulder" with relief "in the office today." (EX-3, p. 9). Dr. Maki noted limited motion and pain on "extremes of motion." Dr. Maki further indicated Claimant experienced pain in his back and that Claimant limited his back motion. Dr. Maki restricted Claimant's activity level due to the back pain and signed a work status form that released Claimant to sedentary work.[29] (EX-3, pp. 9-10).

Dr. Ralph Peyton Katz

Dr. Katz is a board-certified orthopedic surgeon who was deposed by the parties on January 15, 2003, and again on March 24, 2004. (EX-23; EX-24).

On July 7, 1999, Dr. Katz examined Claimant to render an opinion regarding his medical condition and work status, at the request of Employer. Claimant indicated that he experienced constant pain in his right knee, which "constantly gave way." Claimant complained of a "popping sensation with intermittent swelling" and he used a cane and motorized scooter as prescribed by Dr. Murphy. (EX-23, p. 12). Dr. Katz opined that Claimant did not need the motorized scooter. (EX-23, p. 16). Dr. Katz found no swelling or effusion and "excellent tracking of the patellofemoral joint." In addition, Claimant had full motion of the knee despite complaints of pain. Dr. Katz found the results of the physical examination to be normal, but noted that

[29] During the course of his treatment of Claimant between August 6, 1996 and February 27, 2004, Dr. Maki signed several work status forms releasing Claimant to restricted work activities. On the following dates, Dr. Maki released Claimant to light duty work subject to restrictions: July 10, 1995; August 6, 1996; January 11, 2000; February 25, 2000; September 30, 2003; and October 9, 2003. (EX-3, pp. 5-6, 37, 39, 44, 47). Dr. Maki released Claimant to sedentary to light duty work on the following dates: November 2, 1999, and December 5, 2000. (EX-3, pp. 42, 48). On January 19, 2000 and February 27, 2004, Claimant was released to sedentary level work. (EX-3, pp. 10, 45).

Claimant had chrondromalacia of the patella or some arthritic changes of the patella which led to his symptoms. (EX-23, pp. 13-14). A physical examination of Claimant's shoulder revealed no palpable tenderness over the AC joint, but some pain over the distal and the clavicle. Claimant experienced occasional popping motion with forward flexion and external rotation. Dr. Katz found some equivocal impingement signs with "abduction/internal rotation," which could have caused some of Claimant's discomfort. (EX-23, p. 15).

On July 7, 1999, Dr. Katz also took X-rays of Claimant's shoulder and knee. The X-rays of the shoulder showed a distal clavicle resection with no "glenoid humeral degenerative arthritic changes." There was some "mild spurring" of the distal spine and no changes over the patellofemoral joint. (EX-23, p. 16). Dr. Katz opined Claimant had symptoms of impingement syndrome in his shoulder and chondromalacia patellofemoral problems in his knee. (EX-23, p. 17). He suggested an injection into the knee with aggressive physical therapy. (EX-4, p. 10). Dr. Katz recommended sedentary duties, which would enable Claimant to avoid terminal flexion, bending and squatting, and overhead work. He also suggested Claimant undergo an updated Functional Capacity Evaluation (FCE).[30] Id. Dr. Katz stated that he made no notes of any signs of exaggeration by Claimant during his exam. (EX-23, p. 18). He opined that Claimant's shoulder and knee conditions should improve with time. (EX-23, pp. 19-20).

Dr. Katz examined Claimant again on December 18, 2002. Claimant informed Dr. Katz that he had received Synvisc injections in his knee, but continued to have pain in his right knee and shoulder. He further informed Dr. Katz that Dr. Maki performed a surgery on January 17, 2000, and that Dr. Maki put him at MMI on May 2, 2000. (EX-23, pp. 20-21).

On December 18, 2002, the physical examination of Claimant's right shoulder revealed full flexion, full abduction, full internal/external rotation, and no signs of atrophy. Claimant experienced soreness and pain with motion, and Dr. Katz noted audible popping of the anterior shoulder with external rotation. Dr. Katz opined Claimant was experiencing tendonitis or impingement-type symptoms with no improvement since 1999. A physical examination of Claimant's knee revealed no effusion and no atrophy. Claimant had full extension and full flexion, but complained of pain with external flexion. There was pain over

[30] The record does not disclose any other FCE after the 1996 FCE.

the patellofemoral joint, but no pain over the patella tendon. The results of the physical examination indicated chrondromalacia of the right knee. (EX-23, p. 23). In addition to physical examinations of the knee and shoulder, Dr. Katz took X-rays of both areas. The shoulder X-ray did not indicate a change from the 1999 visit. The knee X-ray showed some changes in the medial compartment and chondral stenosis or calcification in the meniscus, not noted before. (EX-23, p. 24). Overall, Dr. Katz diagnosed Claimant's knee condition as follows: "chondromalacia and some medial compartment degenerative arthrosis and symptoms consistent with patellofemoral pain." Id.

During the deposition of January 2003, Dr. Katz opined that chondromalacia did not necessitate the use of a motor scooter. Rather, Dr. Katz suggested that Claimant would benefit from knee exercises to strengthen his "quad;" further, a Neoprene sleeve or a cane would be more appropriate devices to assist Claimant. (EX-23, p. 25). Dr. Katz assigned a 14% functional impairment rating to Claimant's knee, attributing 7% to the injury in the 1980s and 7% to the injury in 1995.[31] (EX-23, p. 28).

In December 2002, Claimant already had been approved for medium level duties, but was still not working. As a result, Dr. Katz approved a sedentary position with an ability to stand and move around as tolerated and some limitations in overhead activity. He suggested an updated FCE to determine Claimant's work capabilities and make further recommendations. (EX-23, pp. 25-27). In January 2003, Dr. Katz suggested Claimant could do functional work on at least a sedentary level. (EX-23, p. 29).

Claimant indicated low back pain on the Initial Visit Intake Sheet, but Dr. Katz did not examine Claimant's lower back during the July 1999 and December 2002 examinations because he was only allowed to examine Claimant's knee and shoulder pursuant to Employer's request. Consequently, Dr. Katz's opinions regarding Claimant's injury, disability, and work restrictions only relate to the knee and shoulder injuries. (EX-23, pp. 30-33).

On March 26, 2003, Dr. Katz performed a medical evaluation of Claimant's lower back. (EX-24, pp. 5-6). Claimant indicated he began having back pains in 1997; although Dr. Katz's records do not refer to a specific event, the records do reflect the

[31] Dr. Katz made this assessment based on one knee arthroscopy, not two knee arthroscopies. (EX-23, p. 28).

lower back problems "allegedly resulted" from Claimant's legs giving way. (EX-24, pp. 8-9). A review of Claimant's medical records indicated problems with his back from the 1980s. Physical examination revealed no acute distress, normal symmetry in the pelvic region, no tension signs, and no palpable spasms. Dr. Katz found that lower extremity testing was normal in motor testing. With leg elevation, Claimant complained of mild pain in his lower back around the "4-5 and 5-1 region." Claimant experienced limitation and pain with flexion. Dr. Katz noted Claimant walked with a cane and demonstrated an antalgic gait. (EX-24, pp. 11-12). Plain radiographs revealed some degenerative changes around the "5-1 region" with some disc space narrowing and some mild facet arthropathy. Id.

Dr. Katz found no evidence of leg length discrepancy, although Claimant had a mild antalgic gait. Dr. Katz did not find an obvious injury to Claimant's lower back and did not feel the lower back pain was caused by the knee injury. Rather, Dr. Katz suggested Claimant had degenerative arthritic changes in the lower back which caused the low back pain. (EX-24, pp. 13-14). Claimant did not report a specific event of his knee giving out causing him to fall and hurt his back. (EX-29, pp. 14-15).

On January 29, 2004, Dr. Katz examined Claimant's shoulder. He did not see the films of the MRI and bone scan ordered by Dr. Maki, but he reviewed the report which indicated "inflammation of the rotator cuff musculature and the surrounding bursal structures which are adjacent to the tendons." (EX-24, p. 16). Before Dr. Katz would render an opinion regarding the benefits of shoulder surgery, he recommended Claimant receive an injection to the AC joint and a subacromial injection in an attempt to isolate the pain to determine if surgery would be beneficial. (EX-24, pp. 17-19). If Claimant did not benefit from the injections, Dr. Katz recommended conservative treatment and pain management. (EX-24, p. 28).

At the visit on January 29, 2004, Dr. Katz opined Claimant could return to work subject to restrictions. With respect to Claimant's back, Dr. Katz suggested activity with modified flexion-extension. With respect to the shoulder, Dr. Katz recommended that Claimant not perform any overhead activity and he suggested that weight lifting restrictions be determined by a FCE. Dr. Katz also suggested a limitation on repetitive motion. (EX-24, pp. 20-21). He opined that Claimant could tolerate standing. (EX-24, p. 30). Dr. Katz further opined that Claimant was capable of sedentary to light duty, but a FCE would

be needed to determine Claimant's capabilities beyond light duty. (EX-24, pp. 21-23).

Dr. Katz did not find anything in his records to relate Claimant's back injury to an event at Avondale or to an incident when Claimant's knee gave out. (EX-24, p. 21). A medical record from Thibodaux Regional Medical Center dated July 15, 1998, indicated that Claimant fell when his right knee gave out and Claimant suffered "thoracic back pain." (EX-14, pp. 4-5; EX-24, p. 24). Dr. Katz maintained his opinion that Claimant's low back pain was not caused by his knee giving out, noting that thoracic back pain differs from pain in the lower lumbar spine. (EX-24, pp. 24-26).

Miscellaneous Medical Records

On February 16, 1983, following injury to his right knee at TBW, Claimant underwent an arthroscopy to his right knee by Dr. Wilson Eroche. (EX-15; EX-17, p. 1). Claimant continued treatment with Dr. Eroche until July 6, 1983, during which time Claimant underwent physical therapy stressing quad re-definition and terminal extension. (EX-17, pp. 1-2). On July 6, 1983. Dr Eroche released Claimant at MMI and placed him at 5% partial permanent disability. (EX-17, p. 2).

On January 10, 1991, Dr. Mabey ordered an MRI of Claimant's right shoulder, which indicated "abnormal signal in the supraspinatus tendon on the anterior aspect of the supraspinatus muscule associated with a small fluid collection between the inferior aspect of the mid portion of the supraspinatus muscle and the glenoid rim." (EX-13, pp. 13-14).

On May 3, 1995, Claimant was examined by Dr. Lawrence Russo who diagnosed degenerative arthrosis of the right knee. He noted that Claimant fell "directly upon the patellar tendon and the inferior pole of the patella," but he did not feel that the fall increased the degenerative changes. (EX-4, p. 2). On December 11, 1995, Claimant returned to Dr. Russo, complaining of continued right knee problems. Dr. Russo suggested Claimant suffered from chondromalacia with the possible "giving way symptoms." He advised that Claimant should avoid ladder climbing. (EX-4, pp. 3-4). Dr. Russo noted Claimant's shoulder symptoms were similar to tendonitis or a tear of the rotator cuff, which he ultimately diagnosed as "an acromion impingement syndrome with the possibility of a tear of the rotator cuff." On December 19, 1995, an arthrogram ruled out a "cuff tear," and Dr. Russo recommended a local anesthetic injection in Claimant's

subacromial bursa to determine whether an acromion impingement existed. He further recommended arthroscopic acromioplasty. (EX-4, p. 5).

A personnel progress report dated September 19, 1995, indicates Claimant complained of discomfort in his right shoulder during overhead work. (EX-1, p. 39).

On July 15, 1998, Claimant was received in the emergency room at Thibodaux Regional Medical Center. The emergency room record indicated Claimant experienced thoracic "back pain" and it noted that he fell when his right knee gave out. The emergency room record does not reflect any complaints of lower back pain and Claimant denied any other injuries. (EX-14, pp. 4-5).

Claimant was treated numerous times by physicians at The Family Doctor Clinic ("Clinic") for various ailments and maladies between 1978 and 2003. (EX-12). On March 9, 1981, Claimant was treated for complaints of back pain. (EX-12, p. 8). In 1982, Claimant was seen for a right knee strain. (EX-12, p. 10). In 1996 Claimant again complained of right knee pain after he "fell" on May 30, 1996. (EX-12, p. 18). On February 24, 1999, the Clinic's medical records indicate Claimant began treatment for depression. (EX-12, p. 25). On September 2, 1999, Claimant returned to the Clinic with complaints of acute lower back pain, for which he was referred to Dr. Jimmy N. Ponder. (EX-14, p. 9; EX-12, p. 28). Dr. Francis Robichaux ordered an MRI of Claimant's lumbar spine on September 9, 1999, which showed minimal disc displacement at L5-S1 and mild bilevel disc desiccation, otherwise a "near normal MRI." (EX-12, pp. 66-67).

On September 17, 1999, Dr. Thomas Donner examined Claimant who reported "slow onset of lower back pain evolving over the last year or so following a prolonged problem with his right knee," and a prominent limp which has caused a moderate degree of lower back pain. (EX-12, p. 52). He suggested that Claimant may benefit from a different anti-inflammatory. He prescribed Daypro and Zantac. (EX-12, pp. 52-53).

On September 22, 1999, Dr. Ponder examined Claimant who presented with complaints of low back, bilateral buttock, and bilateral lower extremity pain. (EX-16, p. 1). Dr. Ponder diagnosed the condition as "lumbar radiculitis with mild to minimal neurological findings" and suggested epidural steroid and local anesthetic injections from the "caudal and/or lumbar

epidural route." Id.

Claimant continued treatment with the Clinic for his complaints of lower back pain, depression, and other ailments. On February 16, 2000, the Clinic records diagnosed Claimant with a bulging disc and indicated Claimant underwent epidural steroid injections by Dr. Ponder which provided some relief. Dr. Francis Robichaux opined that Claimant's right knee pain may have contributed to the lower back pain. He recommended continued exercise and rehabilitation. (EX-12, p. 31). In a letter dated July 5, 2000, Dr. Francis Robichaux diagnosed Claimant's condition as Degenerative Joint Disease of his lumbar spine and right knee, with underlying depression. (EX-12, p. 6).

Claimant also presented to the Clinic with complaints of right shoulder pain. On July 7, 2000, Dr. Francis Robichaux referred Claimant to Dr. Richard Robichaux at Orthopedic and Sports Medicine Center. (EX-12, pp. 33-34). On July 28, 2000, Dr. Richard Robichaux examined Claimant regarding his shoulder, knee, and back. Claimant presented with complaints of chronic back ache, but X-rays of his lumbar and cervical spine appeared normal. Dr. Richard Robichaux diagnosed Claimant with mild subluxation of the shoulder and early degenerative arthritis of the knee. He opined Claimant was capable of sedentary to light duty work. (EX-20, p. 8). He recommended that Claimant see Dr. Nick Hatzis, who examined Claimant's right shoulder and found no degree of instability that would cause such severe chronic pain. (EX-20, p. 9-10). Dr. Hatzis recommended a rehab program and reconsideration of surgery after six to eight weeks. Dr. Hatzis did not indicate Claimant presented complaints of lower back pain. (EX-20, p. 10).

On August 3, 2000, Dr. Francis Robichaux indicated Claimant suffered from osteoarthritis of his right shoulder, lumbar spine and right knee, as well as depression. Due to Claimant's condition, Dr. Francis Robichaux felt sedentary level work was appropriate for Claimant. (EX-12, p. 7).

On April 2, 2001, Claimant was referred to Dr. Nagartna Reddy. Dr. Reddy did not observe any functional restrictions while walking, nor did he observe any limitation of movement or joint abnormalities. He noted Claimant may not be able to do heavy work. (EX-12, p. 57).

Physical Therapy Reports

On March 25, 1996, Claimant began physical therapy on his right shoulder at the request of Dr. Walker. Claimant attended therapy three times each week for three weeks at the Physical Therapy Center in Thibodaux, Louisiana. (EX-10).

Claimant was initially referred to The Regional Physical Rehabilitation Center at Thibodaux Hospital by Dr. Maki on August 7, 1996. On August 9, 1996, Claimant began physical therapy treatments which consisted of moist heat and scar tissue massage to the right knee. Claimant received instruction on a progressive resistive exercise program and was to continue with therapy three times each week for three weeks. (EX-5, pp. 6-7). On September 30, 1996, Claimant was discharged from physical therapy with instructions on a home exercise program, but he continued to experience right knee pain with exercise and daily activity. (EX-5, p. 9).

From September 2, 1999 through September 9, 1999, Claimant again attended physical therapy at The Regional Physical Rehabilitation Center pursuant to the recommendation of Dr. Francis Robichaux. The physical therapy consisted of moist heat, plus ultrasound and therapeutic exercises to the lumbar spine. Claimant attended four of the six prescribed treatments. (EX-5, p. 13).

On August 21, 2000, Dr. Nick Hatzis prescribed physical therapy for Claimant's right shoulder at The Regional Rehabilitation Center. Claimant was instructed to attend therapy three times each week for four weeks. (EX-5, p. 16). An initial evaluation took place on September 8, 2000, which indicated Claimant suffered from a chronic right shoulder injury and he experienced pain that prevented the performance of daily household activities. (EX-5, pp. 22-24). On December 7, 2000, Claimant was discharged from physical therapy; Claimant "refused/did not return to therapy" after attending nine of twelve prescribed visits. (EX-5, pp. 17, 32).

The Vocational Evidence

Alan L. Taylor, Ph.D.

On March 17, 1997, Claimant was referred to Dr. Alan Taylor for an assessment of his "intellectual and academic potential as

they relate to vocational planning."[32] Dr. Taylor concluded Claimant functioned intellectually in the average range. He demonstrated stronger performance skills than verbal skills. The results indicated a generalized academic disorder and learning disorder. Dr. Taylor opined that Claimant was "experiencing reactive depressive and anxious difficulties which are associated with his loss of employment. (CX-3, p. 5).

Functional Capacity Evaluation (FCE)

On May 16, 1996, Claimant underwent an FCE at the Rehabilitation Institute of New Orleans at the request of Dr. Walker. The results of the FCE indicated Claimant performed with equivocal symptom exaggeration. The FCE placed Claimant's physical demand work level at "light-medium" which places a 35-pound limitation on Claimant for occasional lifting and a 15-pound limitation on Claimant for frequent lifting. (EX-11, p. 1). As to Claimant's non-material handling activities, the FCE indicated Claimant was capable of "constant" sitting. Further, it suggested Claimant was capable of frequent performance of the following activities: standing, walking, bending, reaching. The FCE recommended that Claimant never engage in crawling, but he could occasionally engage in kneeling and squatting. (EX-11, p. 2). The FCE evaluators concluded Claimant exhibited "symptom Exaggeration and Inappropriate Illness Behaviors" and failed 31% of his validity criteria. This indicated partial sub-maximal effort which means it is possible that Claimant was capable of performing at a higher level than exhibited, specifically the medium level of work. The FCE recommended a Work Conditioning/Rehabilitation Program. (EX-11, p. 3).

The Contentions of the Parties

The parties stipulated that Claimant suffered a work-related right knee injury on March 9, 1995, during the course and scope of his employment with Employer.

Claimant contends that the knee injury caused him to fall

[32] Prior to his 1995 injury, on October 23, 1995, Claimant underwent an evaluation at the Helping Place to determine the cause of his low academic achievement. During the evaluation, Claimant stated that he had been diagnosed with Spinal Bifida as a child. (EX-19, p. 1). Claimant exhibited a profile pattern consistent with a learning and reading disability. He demonstrated average general intelligence, as well as an average level of cognitive functioning. (EX-19, p. 2). Claimant had a greater mechanical aptitude, but "not enough to make a difference." He met the criteria for adult attention deficit disorder. (EX-19, p. 4).

in July 1998. Claimant contends that he suffered a compensable back injury as a result of the fall. Claimant also contends that he suffered a work-related shoulder injury during his employment with Employer which is not time barred. Claimant maintains that he reached maximum medical improvement and that he is totally disabled as a result of his injuries. Claimant requests disability benefits from October 14, 1996 through January 17, 2000, and from June 7, 2000 and continuing. Claimant argues Employer failed to establish suitable alternative employment, claiming the vocational expert used the wrong disability standard in assessing Claimant, in that sedentary and light or higher physical demands were used. In addition, Claimant maintains that Employer failed to raise an issue as to the timeliness of the shoulder claim at the first hearing and any defense related to timeliness is thereby barred.

Employer contends Claimant failed to raise his shoulder injury claim within one year of the alleged injury. Employer argues Claimant did not establish a new accident or injury to the shoulder after 1990, thus the claim is prescribed. Employer also contends Claimant failed to relate his back injury to the work-related knee injury. Employer also argues that suitable alternative employment was established through the labor market surveys and that Claimant is capable of returning to gainful employment at a wage equal to or greater than what he earned at the time of injury.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v.

Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant alleges three injuries in his claim: a right knee injury, a lower back injury, and a right shoulder injury. The parties stipulated that Claimant was injured in an accident during the course and scope of his employment with Employer on March 9, 1995. Claimant alleges he suffered an injury to his right knee at the time of the accident. Claimant also alleges he suffered a further injury to his back in 1998, when his right

knee "gave out." According to Claimant, the back injury is compensable as a "natural and unavoidable consequence" of the right knee injury. As to the shoulder injury, in his post-hearing brief, Claimant only argued that Employer's Section 13 objection was not timely raised; however, before addressing any questions of timeliness, I will first address whether the record in fact establishes a compensable shoulder injury.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

When Claimant sustains an injury at work which is followed by the occurrence of a **subsequent injury or aggravation** outside work, Employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. Bludworth Shipyard v. Lira, 700 F.2d 1046 (5th Cir. 1983); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986); Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981). Claimant is entitled to the Section 20(a) presumption if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 144 (1991).

Based on the stipulation of the parties that an accident and injury occurred during the course and scope of employment, I find that Claimant suffered a compensable injury to his right knee on March 9, 1995.

Dr. Maki indicated Claimant complained of a "giving way" sensation in his right knee following the 1995 injury. Claimant testified that he began to experience back pain after his knee "gave out" at his home, causing him to fall against a couch. Claimant's testimony was supported by a medical record from Thibodaux Regional Medical Center dated July 15, 1998. Claimant presented to the emergency room complaining of back pain after he fell when his knee gave out. Claimant further testified that he has discomfort in his lower back after extended periods of walking and that he experiences lower back pain to the point that it affects his ability to sleep.

In September 1999, Claimant underwent an MRI which indicated a mild, noncompressive disc bulge at L5-S1. Shortly thereafter, Dr. Ponder diagnosed Claimant's condition as "lumbar radiculitis with mild to minimal neurological findings." In 2000, Dr. Francis Robichaux diagnosed Claimant with degenerative joint disease of the lumbar spine. Dr. Francis Robichaux opined the knee injury could have contributed to Claimant's lower back pain. Based on the foregoing, I find the medical records support Claimant's subjective complaints of pain and indicate the work-related knee injury and subsequent "giving way" could have "caused, aggravated, or accelerated" Claimant's back condition.

Consequently, I find Claimant has established a **prima facie** case that he suffered a back injury under the Act, having established that he suffered a harm or pain on or about July 15, 1998, when his knee gave out causing him to fall which resulted in harm or pain to his back sufficient to invoke the Section 20(a) presumption as a natural and unavoidable consequence of his work-related knee condition. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

As to Claimant's alleged shoulder injury, the record indicates Claimant sustained an injury to his right shoulder in 1990, during his employment with Employer. He did not file a claim regarding the incident, but received treatment for the injury and continued working. Claimant testified he experienced intermittent shoulder problems following the 1990 injury and further irritated his right shoulder while working in the RWRP program in 1995. According to his testimony, his job in the RWRP program required overhead work such as storing items on upper shelves. He filed an accident report on September 18, 1995, indicating he experienced pain in his right shoulder while moving boxes on shelves.

Claimant was employed in the RWRP program from July 1995 through November 1995, and the medical records indicate his complaints of right shoulder pain began in November 1995. Dr. Walker, who performed surgery on Claimant's right shoulder, diagnosed chronic tendonitis of the shoulder which he testified could be caused by overuse in day-to-day activities, as well as trauma. I find Claimant's complaints of pain credible and sufficient to establish a physical harm or pain, and I further find that his medical records corroborate a connection between the pain and Claimant's work-related RWRP activities in 1995. Thus, Claimant has established a **prima facie** case of a work-related shoulder injury or aggravation of a pre-existing

shoulder condition sufficient to invoke the Section 20(a) presumption.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's conditions were neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994);. "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a

pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer disputes Claimant's assertion that the back injury is work-related as a "consequence" of the knee injury. Employer argues Claimant failed to provide any expert opinion to connect the two injuries. Further, Employer objects to Claimant's right shoulder claim on the basis that the claim was untimely filed under Section 13 of the Act.

Claimant underwent a back evaluation by Dr. Katz at the request of Employer. Dr. Katz found degenerative changes and mild facet arthropathy in Claimant's lower back, but found no indication of "obvious" injury to the back. Dr. Katz opined the back pain was not caused by Claimant's knee condition. Dr. Katz supported his opinion by noting that the report from Thibodaux Regional Medical Center reflected complaints of thoracic back pain, rather than complaints of pain in the lumbar region.

Dr. Maki's medical records reflect Claimant presented with complaints of back pain as early as 1996, but there was no indication that Claimant ever related his back pain to an incident involving his right knee. Similarly, Dr. Ponder's medical reports that reflect complaints of back pain are devoid of any connection between the back pain and Claimant's right knee. Dr. Maki diagnosed Claimant with degenerative arthritic changes, which supports the opinion of Dr. Katz. During the September 16, 2003, examination of Claimant, Dr. Maki found arthritic changes in Claimant's lower back as well as a soft tissue sprain. Dr. Maki testified that both conditions were common in Claimant's age group. Dr. Maki further testified that Claimant's 1999 MRI was unremarkable even with the presence of a minimal disc bulge at L5-S1.

As to Claimant's right shoulder injury, his LS-203 form dated December 1995 identifies the date of injury as November 5,

1990, and describes the events of the 1990 incident rather than a more recent occurrence, such as a 1995 RWRP event. An initial report by Dr. Walker suggested Claimant "experienced exacerbation of his [shoulder] symptoms with his normal work activities," but the record does not contain any medical reports that specifically link the shoulder condition to any events of 1995. The report by Dr. Murphy states Claimant had continuing problems with his shoulder following the 1990 injury, but Claimant continued working until he had an arthrogram of the shoulder in 1996. The patient history provided by Dr. Katz identifies only the 1990 injury to Claimant's right shoulder. Medical records by Dr. Walker and Dr. Hatzis also note that Claimant suffered a shoulder injury in 1990, but he continued working until his condition progressed to the point that he sought further treatment or could no longer work. Only the patient history provided by Dr. Maki attributes the shoulder pain to "a work-related injury of 03/09/1995."

Based on the foregoing, I find that Employer rebutted the Section 20(a) presumption by Dr. Katz's opinion that Claimant's back injury was not related to his knee condition and that Claimant suffers only a 1990 shoulder injury which is arguably untimely filed. Therefore, the record evidence as a whole must be weighed and evaluated to determine work-relatedness and causation.

3. Weighing the Record Evidence

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

I conclude Claimant did not suffer a compensable back injury. Only Dr. Murphy and Dr. Francis Robichaux offered opinions suggesting that Claimant's back pain may be related to

his right knee injury. Dr. Murphy's report of September 10, 1997, noted that Claimant complained by history of back pain after his right knee gave out. However, none of the medical records identify an incident of Claimant's knee giving way other than the report from Thibodaux Regional Medical Center in July 1998, which reflects complaints of pain in his thoracic back, rather than in his lower back. On February 18, 2000, Dr. Francis Robichaux opined Claimant's right knee pain and use of a cane "may have contributed" to his low back pain. However, Dr. Katz credibly opined that Claimant's back pain is unrelated to the knee injury. Further, it should be noted that Dr. Katz and Dr. Maki are in agreement as to the existence of arthritic changes in Claimant's lower back.

The record contains one report from Dr. Donner in September 1999 which refers to the "slow onset of lower back pain evolving over the last year or so following a prolonged problem with [Claimant's] right knee." However, the records of Dr. Maki, Dr. Katz, and Dr. Ponder do not indicate Claimant complained of back pain related to his right knee ailments. In addition, Claimant's medical records reveal that he complained of back pain to the Family Doctor Clinic as far back as 1981. According to Dr. Katz, Claimant indicated he always had back pain which was getting worse. I find Claimant's testimony unpersuasive and incredulous given his inconsistent reports of causation made to his physicians.

Based on the foregoing, I conclude Claimant did not suffer a compensable back injury because there is insufficient evidence in the record to establish a nexus between his back pain and his 1995 knee injury and its sequelae.

In regard to the right shoulder claim, I find that reliance on the LS-203 form alone, which states the injury occurred on November 5, 1990, is not substantial enough to conclude that Claimant did not sustain an injury in 1995. On September 18, 1995, Claimant filed an accident report with Employer after experiencing right shoulder pain while lifting boxes onto shelves. Further, Dr. Walker testified that Claimant's chronic tendonitis could be caused by overuse in activities. Considering the foregoing in conjunction with Claimant's job description in the RWRP and the timing of Claimant's credible renewed complaints of shoulder pain, I find that the record as a whole supports a conclusion that Claimant suffered an aggravation of his prior right shoulder condition and that he sustained a 1995 compensable work-related right shoulder injury. No medical opinion was offered to the contrary.

Section 13(a) of the Act states the right to compensation for disability or death "shall be barred unless a claim therefore is filed within one year after the injury or death." Section 13(b)(1) of the Act provides that failure to file a claim within the prescribed time period will not bar the claim "unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard."

Employer objected to the shoulder injury claim during the first hearing before the Administrative Law Judge. "**First hearing of a claim**" refers to a hearing before the administrative law judge, rather than before the district director. See 33 U.S.C. §919(d); Lucas v. Louisiana Insurance Guaranty Association, 28 BRBS 1 (1994); Barthelemy v. J. Ray McDermott & Co., 537 F.2d 168, 4 BRBS 325 (5th Cir. 1976), aff'g 1 BRBS 23 (1974); Carlow v. General Dynamics Corp., 15 BRBS 115 (1982). Despite Claimant's contention that Employer should have addressed this issue during the informal conference with the District Director, I find and conclude that Employer properly raised an objection related to the timeliness of the claim. However, because I find Claimant re-injured his right shoulder in 1995, Claimant's claim filed in December 1995 was timely filed within the one year time frame.

Consequently, I conclude Claimant suffered a compensable right knee injury based on the stipulations of the parties. I further conclude Claimant suffered a compensable right shoulder injury due to the progression or exacerbation of his pre-existing shoulder condition aggravated by his 1995 RWRP work activities. However, I conclude Claimant did not suffer a compensable back injury because the record does not support a connection between his lower back pain and his work-related knee injuries or a subsequent "giving way" of his right knee.

B. Nature and Extent of Disability

Having found that Claimant suffers from compensable knee and shoulder injuries, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his

usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

An ALJ must make a specific finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quniton Eng'rs, 14 BRBS 395, 401 (1981). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15 (1988).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

1. The Scheduled Disability Benefits

If the permanent disability is to a member identified in the schedule, as in the instant case, the injured employee is entitled to receive two-thirds of his average weekly wage for a specific number of weeks, regardless of whether his earning capacity has been impaired. See Henry v. George Hyman Construction Co., 749 F.2d 65, 17 BRBS 39 (CRT) (D.C. Cir. 1984).

In the case of permanent partial disability, Section 8(c)(2) of the Act provides an employee with "leg lost" compensation for 288 weeks at a rate of sixty six and two-thirds percent of the average weekly wage. Section 8(c)(19) of the Act

further states that "compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member."

In 1983, Dr. Eroche performed surgery on Claimant's right knee and assigned a five percent permanent partial disability to the knee. After Claimant re-injured his knee in 1995 and underwent a subsequent surgery, Dr. Maki anticipated a functional impairment between 10% and 15% to the right knee. However, Dr. Maki suggested the 10% to 15% range in 1995 when Claimant had not yet reached MMI. At the time Dr. Maki declared MMI in 2000, he also opined Claimant had a 20% impairment rating to his right lower extremity. Given Claimant's prior knee injuries, Dr. Maki initially suggested one-half of the impairment rating (7.5%) should be attributed to pre-existing knee injuries; however, at his deposition Dr. Maki ultimately attributed two-thirds of Claimant's impairment rating to the pre-existing injuries and two prior surgeries. On February 23, 2000, Dr. Maki opined Claimant reached MMI and assigned a 20% functional impairment to the "right lower extremity." Dr. Katz likewise found permanent impairment to Claimant's right knee, however, he opined the impairment rating to be 14% with one-half (7%) attributable to Claimant's pre-existing injuries. Dr. Murphy, an examiner for the DOL, found no significant difference in Claimant's disability before and after the 1995 injury. Nonetheless, he suggested an increased disability of between 5% and 10%.

The joint exhibit (JX-1) reflects a permanent disability with 7.5% impairment to the right knee and 7.5% impairment to the right leg. The stipulations show Claimant has been paid permanent partial disability for the 7.5% impairment to his right knee at a rate of $337.27 per week for 21.6 weeks. In addition, Claimant has been paid permanent partial disability benefits for the 7.5% impairment to his right leg at a rate of $337.37 per week for 7.20 weeks. The parties stipulated to an average weekly wage of $505.90 at the time of the March 9, 1995, injury.

Based on the medical evidence of record, I find the record supports the stipulation of 7.5% impairment to Claimant's right knee. The opinions offered by Dr. Maki, Dr. Katz, and Dr. Murphy attribute between six percent and ten percent of Claimant's present disability rating to the 1995 injury. As such, a stipulation of 7.5% impairment to the right knee is not unreasonable and will not be disturbed. Thus, Employer shall pay Claimant scheduled disability benefits for the right knee

injury at a rate of $337.27 per week ($505.90 x 66 2/3% = $337.27). Because only 7.5% of the impairment is attributable to a work-related injury, Employer shall pay scheduled disability benefits for 21.6 weeks at the aforementioned rate (7.5% x 288 weeks = 21.6 weeks). Thus, Claimant is entitled to a total of $7,285.03 ($337.27 x 21.6 weeks = $7,285.03) for the scheduled injury to his right knee, which Employer has already paid to Claimant.

As to the stipulations regarding impairment to Claimant's right leg, I find the record does not support such a stipulation. The medical records of Dr. Maki and Dr. Katz do refer to impairment of Claimant's lower right extremity. However, I find a separate award for disability to Claimant's leg is not reasonable or appropriate given the scheduled disability attributable to the knee. The record offers no evidence of a separate injury to Claimant's right leg; rather, the medical reports and complaints of Claimant refer only to the injuries sustained to his right knee. I find that the award of scheduled disability benefits regarding Claimant's right knee are sufficient to compensate for any impairment sustained in Claimant's right leg as a whole. See Mason v. Baltimore Stevedoring Co., 22 BRBS 413, 416-417 (1989)(When one accident resulted in an injury to a larger member (arm) and a connected smaller member (hand), ALJ cannot issue separate permanent partial disability awards). Consequently, I find that Employer has over-paid scheduled disability benefits and is entitled to a credit of $2,428.34 ($337.27 x 7.20 weeks = $2,428.34).

2. The Non-scheduled Disability Benefits

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. Potomac Elec. Power Co. v. Director OWCP, 449 U.S. 268, 277 n.17, 14 BRBS 363 (1980)(herein "PEPCO"); Davenport v. Daytona Marine & Boat Works, 16 BRBS 168, 173 (1984). Unless the worker is totally disabled, however, he is limited to the compensation provided by the appropriate schedule provision. Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984).

The record does not contain an opinion from any physician that specifies a date of MMI for Claimant's right shoulder. However, Dr. Murphy assigned a 15% impairment rating to Claimant's right shoulder on September 30, 1996. Dr. Walker was treating Claimant's shoulder injury at the time and opined

Claimant had reached MMI as of July 16, 1996. Further, the later medical reports of Dr. Maki and Dr. Katz do not provide opinions as to MMI or an impairment rating. Based on the foregoing, I find Claimant's shoulder injury reached MMI on July 16, 1996, pursuant to the opinion of Dr. Walker, and he has suffered a permanent disability of the right shoulder since that date.

At the hearing in this matter, Employer argued that Claimant should be declared temporarily disabled if future shoulder surgery is deemed necessary. I disagree and find that Claimant achieved MMI for his right shoulder, and, therefore, conclude Claimant remains permanently disabled despite "a temporary deterioration" of his right shoulder. See Leech v. Service Engineering Co., 15 BRBS 18 (1982) (a temporary total disability award subsumed the permanent partial award for the same injury, but the underlying permanent partial disability did not disappear during the temporary exacerbation); Davenport v. Apex Decorating Company, Incorporated, 18 BRBS 194, 196-197 (1986).

At the time of the injury on March 9, 1995, Claimant was employed as a welder in Employer's electrical department. According to Ms. Favaloro, Claimant "welded and fitted" and had prior experience in construction work. Ms. Favaloro classified Claimant's prior work experience as medium to heavy, or heavy.

However, Claimant's present medical conditions place his work restrictions at sedentary work, according to Dr. Maki. In 1996, Dr. Walker released Claimant to medium duty work. Although in 2003 Dr. Walker stated Claimant's shoulder should not prevent his return to work, he assigned 10% to 20% impairment to Claimant's upper extremity. In 2000, Dr. Murphy suggested Claimant was capable of sedentary work only. Claimant's treating physician, Dr. Maki, initially released Claimant to moderate work at his former job, but in September 1996 increased his restrictions to "light sedentary duty," and most recently released Claimant to sedentary work on February 24, 2004. Even Dr. Katz, who examined Claimant at the behest of Employer, opined Claimant was capable of returning to work subject to restrictions, suggesting sedentary to light duty as of January 29, 2004. Consequently, I find Claimant has established a **prima facie** case of total disability because his restrictions preclude his return to his former medium to heavy work since 1996 as a result of his work-related injuries.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, as here, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See

generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in Palumbo v. Director, OWCP, 937 F.2d 70, 76 (2d Cir. 1991), that MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that ". . . It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." Id.

In view of Claimant's multiple injuries and varying periods of work capacity, the time periods below reflect my findings and conclusions regarding Claimant's disability status. Although Claimant provided self-limitations with respect to his physical capacity, namely an inability to walk or stand for extended time periods without experiencing knee and lower back pain and the need to rest daily, I find that his treating physician's opinions regarding his physical capacity is more persuasive and credible. Accordingly, Claimant's testimony contrary to Dr. Maki's opinion is not deemed compelling.

March 10, 1995 through July 23, 1995

Claimant was injured on March 9, 1995, at which point he was unable to return to his job as a welder. On June 9, 1995, Dr. Maki indicated Claimant was unable to return to "heavy" work. On July 10, 1995, Dr. Maki placed Claimant at light duty work with restrictions on climbing, kneeling, and stooping. Employer presented no evidence of suitable alternative employment during this time period. Further, the parties entered into a joint stipulation that Claimant was temporarily totally disabled from March 10, 1995 through March 26, 1995, and again from April 4, 1995 through July 23, 1995. I find the stipulations are supported by the record and conclude Claimant is entitled to temporary total disability benefits from March 9, 1995 through July 23, 1995, based on an average weekly wage of $505.90, which has been paid by Employer with the exception of the period from March 27, 1995 through April 3, 1995.

July 24, 1995 through October 22, 1995

On July 24, 1995, Claimant entered Employer's RWRP program under Dr. Maki's light work restrictions. The parties stipulated Claimant had a loss of wage earning capacity of $250.70 per week, resulting in a compensation rate of $167.13, which Employer paid for 13 weeks from July 24, 1995 through October 22, 1995. Thus, Claimant was temporarily partially disabled during this period and, pursuant to the stipulation of the parties, is entitled to temporary partial disability compensation based on two-thirds of the difference between his average weekly wage and his wage earning capacity of $255.20, resulting in payments of $167.13. ($505.90 - $255.20 = $250.70 x .6666 = $167.11). In view of the foregoing, the parties' stipulation of $167.13 as a compensation rate is considered reasonable and is accepted.

October 23, 1995 through November 19, 1995

On October 13, 1995, Dr. Maki allowed Claimant to return to "regular work as a welder" with limitations on squatting and climbing. Although Dr. Maki's release allowed Claimant to return to his original employment, the release was subject to restrictions which I find precludes Claimant's performance of his former job and thus he was totally disabled during this period. On October 31, 1995, Dr. Maki's report allowed Claimant to "return to his previous work as a welder," but it did not indicate any restrictions on his work activities.

From October 23, 1995 through November 19, 1995, Claimant remained in the RWRP program, without being paid additional loss of wage earning capacity compensation as reflected by the parties' stipulation. Although Claimant was not released to full duty without restrictions until October 31, 1995, Claimant's participation in the RWRP program constituted suitable alternative employment at a rate of $6.38 per hour. Even after he was released to his "previous work as a welder" on October 31, 1995, Employer's payroll records do not reflect a change in his job title and pay until November 20, 1995. Thus, I find and conclude Claimant is entitled to temporary partial disability benefits from October 23, 1995 to November 19, 1995, based on the difference in his average weekly wage of $505.90 and his weekly wage earning capacity of $255.20 ($6.38 x 40 hours = $255.20).

November 23, 1995 through July 28, 1996

The parties stipulated that Claimant was temporarily totally disabled from November 23, 1995 through July 28, 1996, and Claimant was paid temporary total disability benefits during that period as a result of the September 18, 1995 injury.[33] However, Employer's payroll records indicate Claimant was employed as a "welder" on November 20, 1995, at an hourly rate of $12.59. Claimant testified that he worked for Employer from November 1995 to July 1996. Accordingly, I find the record does not support the parties' stipulation of temporary total disability for this time period when Claimant actually worked at his former job.

The work restrictions assigned by Dr. Walker on November 29, 1995, due to Claimant's shoulder injury, are sufficient to establish temporary total disability. Nonetheless, Claimant was actively employed and earning compensation as a welder. Consequently, I find appropriate an award of temporary partial disability based on the difference between his average weekly wage and his wage earning capacity from November 23, 1995 to July 28, 1996. Thus, I conclude Claimant is entitled to temporary partial disability from November 23, 1995 to December 31, 1995, based on the difference between his average weekly wage of $505.90 and his weekly wage earning capacity of $503.60

[33] The joint stipulation states that temporary total disability benefits were paid due to the September 18, 1995 injury from "1/23/95 to 7/28/96." However, none of Claimant's work-related injuries at issue occurred prior to March 9, 1995. In addition, the stipulation specifically identifies a period of temporary total disability as "11/23/95 to 7/28/96." Therefore, I assume that "1/23/95" is a typographical error intended to be "11/23/95."

($12.59 x 40 hours = $503.60). On January 1, 1996, Claimant received a wage increase to $13.03 per hour which exceeded his earnings at the time of injury. (Tr. 107). Thus, I conclude Claimant is not entitled to compensation from January 1, 1996 through July 28, 1996. I further conclude Employer is entitled to a credit for any overpayments made to Claimant from November 23, 1995 to July 28, 1996.

July 29, 1996 to October 14, 1996

On July 16, 1996, Claimant was placed at MMI by Dr. Walker for his shoulder injury. On July 29, 1996, Claimant ceased his employment with Employer and has not worked since. The parties stipulated that Claimant was temporarily totally disabled and received temporary total disability benefits from August 6, 1996 through October 14, 1996. I find since Claimant had reached MMI and a state of permanency, he was permanently totally disabled rather than temporarily totally disabled. I further find that Claimant was permanently totally disabled from July 30, 1996 to August 5, 1996.

October 15, 1996 through January 16, 2000

On October 1, 1996, Ms. Favaloro performed the first labor market survey of jobs available to Claimant in the Vacharie, Louisiana area. The initial labor market survey was based on a 1996 FCE and the opinions of Dr. Maki, Dr. Walker, and Dr. Murphy. According to Ms. Favaloro, the FCE indicated Claimant was suited for medium duty work which allowed constant sitting, and frequent standing, walking, bending, and reaching. In addition, Claimant was limited to occasional squatting or kneeling; he was never to crawl. According to Ms. Favaloro's report, the FCE suggested Claimant could engage in occasional lifting of 23 pounds.

Ms. Favaloro also considered Dr. Maki's August 6, 1996 opinion, which indicated Claimant was suited for medium level work, subject to no climbing, deep knee bends, or pivoting. Dr. Walker also opined Claimant was capable of medium duty work. However, Dr. Murphy suggested Claimant was suited for "light-sedentary," but restricted his activities for the shoulder and knee injuries. The restrictions given by Dr. Murphy included no overhead, repetitive, or heavy lifting; no climbing; no squatting; no long standing; and no significant walking.

The medical reports of Dr. Murphy and Dr. Walker corroborate the restrictions cited by Ms. Favaloro. The FCE

indicates Claimant was suited for "light-medium" work with the physical limitations identified in the Vocational Rehabilitation Report.[34] Despite his August 6, 1996 medical report that Claimant was capable of medium grade activity, Dr. Maki signed a work-release form on the same date which released Claimant to light duty work with restricted climbing, kneeling, stooping, pivoting, and squatting. On September 26, 1996, Dr. Maki opined Claimant was capable of "sedentary to light duty work."

Although Dr. Walker suggested medium duty work based on the results of Claimant's FCE, I do not find his recommendation persuasive because he treated Claimant's right shoulder injury only. Dr. Maki recommended sedentary to light duty due to Claimant's knee injury, which I find more persuasive than the "light-sedentary" duty, which is arguably less than full sedentary duties, recommended by Dr. Murphy. However, as to Claimant's restrictions to his right shoulder, I find Dr. Murphy's opinion reasonable as the most recent and most restrictive. Accordingly, based on a composite of reasonable medical opinions of record, I find Employer must demonstrate suitable alternative employment within a sedentary to light duty range and subject to the following restrictions: no repetitive climbing, no bending, no squatting, no heavy or repetitive lifting, and limited overhead work. Thus, I find and conclude any jobs identified by Ms. Favaloro under a standard higher than light duty exceed Claimant's physical capabilities.

Of the six potential jobs identified in the labor market survey on October 1, 1996, only two descriptions identify a lifting requirement for the position. The route sales person for Frito Lay would be required to lift up to 40 pounds, which places the job above a light duty classification. The photo lab worker position with Peterson Studio and Imaging fell within the light duty classification as it required lifting under 15 pounds. However, the job descriptions in the labor market survey for the photo lab worker and the remaining positions, failed to address any other physical requirements placed on Claimant other than lifting activities. In the absence of such information, I find that Employer did not provide sufficient details to allow a comparison between the jobs' physical demands and Claimant's restrictions to conclude that Employer demonstrated suitable alternative employment as of October 1, 1996. Thus, I find and conclude that since Claimant was placed at MMI on July 16, 1996, Claimant is entitled to permanent total

[34] According to the FCE, light-medium duty involves occasional lifting up to 35 pounds and frequent lifting up to 15 pounds.

disability benefits from October 15, 1996 through January 16, 2000, based on an average weekly wage of $505.90. I further find and conclude based on the joint stipulation that Employer paid temporary total disability benefits for the stipulated period from January 17, 2000 through June 7, 2000, which should be characterized as permanent total disability.

March 29, 2000 through December 19, 2002

On March 29, 2000, Ms. Favaloro generated a second labor market survey based on the recommendations of Dr. Murphy, Dr. Katz, and Dr. Maki. Although Dr. Murphy opined Claimant was capable of sedentary work on February 22, 2000, the vocational rehabilitation report relies upon Dr. Murphy's opinion of August 1996 which placed Claimant at "light sedentary" activities. On July 12, 1999, Dr. Katz recommended sedentary duty. Dr. Maki continued as Claimant's treating physician and signed a work status form on February 25, 2000, that released Claimant to light duty work. According to the work status form, Claimant was instructed to avoid ladders, climbing, jumping, prolonged squatting, and crawling. Because Dr. Maki is Claimant's treating physician, I afford greater weight to his recommendation in determining the availability of suitable alternative employment.

The labor market survey produced on March 29, 2000, identified seven job openings in the Vacherie, Louisiana area. Dr. Maki and Dr. Katz were provided copies of the job descriptions. Dr. Maki approved all seven jobs based on the descriptions given, and Dr. Katz approved six of the seven jobs. Dr. Katz concluded a job as a Domino's Pizza delivery driver was unsuitable employment for Claimant. Based on the doctors' approval and after a review of the record and job descriptions presented, I find Employer demonstrated the availability of suitable alternative employment as of March 29, 2000, which paid an average of $5.99 per hour, or $239.60 per week.[35]

On June 29, 2001, Dr. Maki slightly changed Claimant's work restrictions, opining Claimant could not return to gainful employment that required standing for more than two to three hours, climbing, bending, or squatting. Despite the changes in Claimant's restrictions, the jobs identified in the labor market survey from March 29, 2000, still conform to Claimant's updated limitations. Accordingly, I find Claimant entitled to permanent

[35] The hourly rate of the seven jobs yielded an average hourly rate of $5.98. ($7.00 + $7.45 + $5.75 + $5.15 + $5.90 + $5.15 + $5.50 = $41.90) ($41.90 ÷ 7 = $5.99) ($5.99 x 40 hours = $239.60)

partial disability benefits from March 29, 2000 through December 19, 2002, based on the difference between the average weekly wage of $505.90 and his weekly wage earning capacity of $239.60 per week. I further find and conclude that Employer should receive credit for the total disability payments made to Claimant from March 29, 2000 through June 7, 2000, as Claimant was permanently partially disabled through the establishment of suitable alternative employment.

December 20, 2002 through November 22, 2003

On December 20, 2002, Ms. Favaloro performed a third labor market survey of the Vacherie, Louisiana area. At that time, Dr. Maki had not changed Claimant's restrictions since July 24, 2001. In addition, Dr. Katz opined Claimant was capable of sedentary activity that allowed him to stand and move as tolerated. He further recommended limited overhead activity for Claimant's shoulder. Again, I afford greater weight to the limitations placed on Claimant by Dr. Maki. The labor market survey generated in December 2002 presented five jobs as proposed suitable employment for Claimant, and Dr. Maki and Dr. Katz approved all five jobs on December 20, 2002. I have reviewed the job descriptions provided in the record and find that the positions with All-Fax and PCA International both required lifting of up to 25 pounds which exceeds light duty. However, the remaining three jobs compose suitable alternative employment comporting within the light duty restrictions placed on Claimant. Thus, suitable alternative employment continued to be established from December 20, 2002 through November 23, 2003, with a new weekly wage earning capacity of $256.80.[36] Accordingly, Claimant is entitled to permanent partial disability benefits from December 20, 2002 through November 23, 2003, based on the difference between the average weekly wage of $505.90 and his weekly earning capacity of $256.80.

November 24, 2003 through February 26, 2004

On November 24, 2003, Ms. Favaloro generated another labor market survey based on the updated medical reports of Dr. Maki. Ms. Favaloro used the following restrictions from Dr. Maki's report dated September 24, 2003, and which are identical to the

[36] The hourly rate for each position was determined using the lowest hourly compensation rate provided for each position, since arguably Claimant is an entry level employee with no prior experience at such jobs. The hourly rates of the three jobs yielded an average hourly rate of $6.41. ($7.25 + $6.00 + $6.00 = $19.25) ($19.25 ÷ 3 = $6.42) ($6.42 x 40 hours = $256.80).

restrictions set forth in a work release signed by Dr. Maki on October 9, 2003: "Light work – lifting 20 pounds maximum with frequent lifting and or carrying of objects weighing up to 10 pounds. A job is in this category when it requires walking or standing most of the time with a degree of pushing/pulling of arm or leg controls." In addition, Dr. Maki recommended limited overhead activity due to Claimant's right shoulder. As to the restrictions given by Dr. Katz, on March 26, 2003, he noted Claimant complained of lower back pain if standing too long, but he did not offer specific restrictions on Claimant's work capabilities. While Claimant was still restricted to a light duty classification, neither Dr. Maki nor Dr. Katz identified specific limitations on physical activity aside from overhead work.

The November 2003 labor market survey again established suitable alternative employment based on Claimant's restrictions at that time. Nine job openings were identified, none of which required lifting of more than 20 pounds.[37] Six of the jobs involved sitting most of the time, but the worker could alternately sit, stand, or walk. The jobs with Wilco and Qualex required a significant amount of standing or walking, but constitute suitable alternative employment because the lifting requirements fell within the light duty range. Only the position with All-Fax was unsuitable employment because it required lifting 20-pound boxes, while light duty provides for a 20 pound maximum with maximum frequent lifting weight of 10 pounds. The job descriptions did not indicate that the worker would be required to engage in overhead work. Thus, I find that suitable alternative employment continued to be established with the labor market survey of November 24, 2003, which paid an average of $6.24 per hour, or $249.60 per week.[38] However, the prior labor market survey of December 2002 established suitable alternative employment at a higher weekly wage earning capacity of $256.40. If Claimant had sought and achieved employment as suggested by the prior labor market survey, Claimant would have continued earning the higher weekly wage. As such, Claimant's wage earning capacity will not be reduced based on the more recent November 2003 labor market survey. Thus, I find and

[37] The position as a production technician with All-Fax required lifting and transporting 20-pound boxes, but it did not specify how many boxes would be moved at a time.

[38] The hourly rate for each position was determined using the lowest hourly compensation rate provided for each position, since arguably Claimant is an entry level employee with no prior experience at such job. The hourly rates of the eight jobs yielded an average hourly rate of $6.24. ($7.25 + $6.50 + $6.50 + $5.15 + $5.50 + $6.00 + $6.00 + $7.00 = $49.90) ($49.90 ÷ 8 = $6.24) ($6.24 x 40 hours = $249.60).

conclude Claimant is entitled to permanent partial disability benefits from November 24, 2003 through February 26, 2004, based on the difference between the average weekly wage of $505.90 and his weekly wage earning capacity of $256.80.

Although Claimant testified that he tried to receive retraining for a new job through Louisiana Rehab, the record is vague as to when the retraining occurred. The record contains a letter from Dr. Taylor to Ms. Paige Kelly, a counselor at Louisiana Rehabilitation Services, dated March 17, 1997. Claimant testified that he has not worked since leaving Avondale and has not tried to go back to work since 1996. Accordingly, I find Claimant has not diligently attempted to seek employment since Employer demonstrated suitable alternative employment.

Employer has presented suitable alternative employment as of March 29, 2000, and Claimant has failed to demonstrate reasonable diligence in obtaining employment. Thus, I find and conclude Claimant is entitled to permanent partial disability benefits from March 29, 2000 through February 26, 2004, based on the difference between an average weekly wage of $505.90 and the various weekly wage earning capacities as set forth above.

February 27, 2004 through present

On February 27, 2004, Dr. Maki increased Claimant's work restrictions to a sedentary duty level. On March 24, 2004, Ms. Favaloro performed a labor market survey in which she identified eleven job openings. Ms. Favaloro relied upon Dr. Maki's September 30, 2003 opinion that Claimant was suited for light work. She also referenced his deposition testimony of January 27, 2004, in which he opined Claimant was capable of light to medium duty work. Dr. Katz's report of January 28, 2004, did not discuss Claimant's work restrictions. I find Dr. Maki's most recent opinion of February 27, 2004, to be most persuasive as he is Claimant's treating physician.

After reviewing the eleven job descriptions in the survey, I find only two jobs constitute suitable alternative employment at a sedentary level. The lifting requirements on eight of the jobs exceeded 10 pounds and the unarmed security guard position was not sedentary because of the extensive walking requirement. Only the positions with Superior Answering Service and Acadiana Crew Change appear to fall within the sedentary restrictions in place as of February 2004. I find that the two positions identified by Employer are sufficient to establish suitable alternative employment with a weekly wage earning capacity of

$290.00.[39]

Ms. Favaloro generated a final labor market survey on March 31, 2004, using a sedentary physical demand level of work. However, the March 31, 2004, survey identified only two available jobs. The position with Mobiletel required lifting of less than 15 pounds, which does not conform with the 10-pound maximum lifting for sedentary labor. Thus, the survey of March 24, 2004, only identified one sedentary job opening in the Vacherie, Louisiana area. I find one job insufficient to establish suitable alternative employment when, as here, the employee is not highly skilled, the job identified is not specialized, and there is a large number of workers with suitable qualifications in the community. P & M Crane Co. v. Hayes, 24 BRBS at 121-122. However, I find suitable alternative employment continued to exist based on the prior labor market survey of March 24, 2004. Thus, I find and conclude Claimant is entitled to permanent partial disability benefits from February 27, 2004 through present and continuing based on the difference in the average weekly wage of $505.90 and his weekly wage earning capacity of $290.00.

E. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the

[39] The suitable jobs identified in the labor market survey yielded an average of $7.25 per hour. ($6.00 + $8.50 = $14.50) ($14.50 ÷ 2 = $7.25) ($7.25 x 40 hours = $290.00).

whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

The joint stipulation lists an issue as to Claimant's average weekly wage at the time of each accident. A review of the hearing transcript suggests this is a contested issue because of the non-work related incident involving Claimant's back injury. The parties did not include a discussion of average weekly wage in the post-hearing briefs. Thus, it is difficult to determine their positions on this issue

According to the joint stipulation, Claimant was earning $505.90 per week at the time of his injury. The parties stipulated that Claimant was paid from July 24, 1995 through October 22, 1995, at a loss of wage earning capacity ($250.70) resulting in a compensation rate of $167.13 per week. The record indicates from July 24, 1995 through November 25, 1995, Claimant was employed in the RWRP program, earning $6.38 per hour for a total of $255.20 per week. ($6.38 x 40 hours = $255.20). Thus, Claimant was receiving total compensation of $422.33 per week from July 24, 1995 through October 22, 1995 ($167.13 + $255.20 = $422.33). However, I will not reduce Claimant's average weekly wage simply because his earnings decreased with his enrollment in Employer's work rehabilitation program. Thus, I find Claimant's average weekly wage at the time of his shoulder injury in September 1995 to be the stipulated average weekly wage of $505.90.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

According to Dr. Maki's reports, Claimant is a candidate for further surgery to his right shoulder. Namely, Dr. Maki recommended consideration of debridement and AC joint resection in his reports dated September 16, 2003, September 30, 2003, and October 24, 2003. In addition, Dr. Maki agreed with Dr. Zahrawi's opinion that Claimant would benefit from "arthroscopic evaluation to the subacromial area." However, Dr. Maki expressed uncertainty to the extent Claimant would benefit from the surgical procedure and indicated that he informed Claimant the procedure is "elective." He stated that his recommendation for surgery is "soft" and he hesitated to make a "strong recommendation for surgery" given Claimant's history of depression. Nonetheless, Dr. Maki opined the surgery had a 50% to 70% chance of alleviating Claimant's shoulder pain.

At his deposition, Dr. Katz suggested Claimant undergo two injections to his shoulder before he would suggest further surgery. According to Dr. Katz, an injection into Claimant's AC joint and a subacromial injection to Claimant's shoulder would help isolate the pain. Dr. Katz opined that if Claimant did not receive relief from the injections, he would gain no benefit from surgery. However, in assessing Claimant's shoulder condition, Dr. Katz did not review the films of Claimant's MRI, rather, he reviewed Dr. Maki's report.

Dr. Maki suggested a debridement procedure and an AC joint resection, which are arguably common and routine procedures. As Claimant's treating physician, Dr. Maki recommended that Claimant be considered for these procedures, although he could not guarantee a benefit from the surgery. Dr. Maki stated he would be willing to perform the surgery if Claimant agreed to it, despite his reservations due to Claimant's history of depression. Further, Dr. Katz did not offer specific testimony that Claimant would not benefit from additional surgery. Rather, he indicated that he would base his recommendation on the relief garnered from a series of injections. Thus, I

conclude the surgery recommended by Dr. Maki is both reasonable and necessary, based on his unrebutted opinion that there was a 50% to 70% chance that Claimant would benefit from surgery.[40]

Based on the foregoing, I conclude Employer is responsible for continuing reasonable and necessary medical care for Claimant's right knee and right shoulder since both are found to be compensable injuries.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer was notified of Claimant's knee injury on March 9, 1995, and began paying compensation benefits on March 10, 1995. Employer filed the first of several notices of controversion on December 8, 1995.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[41] Thus, Employer was liable for Claimant's disability compensation payment on March 23, 1995. Employer paid compensation through July 23, 1995, when Claimant entered the RWRP and subsequently. Consequently, I find and conclude that Employer filed a timely notice of controversion on December 8, 1995 and is not liable for Section 14(e) penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of

[40] Although Claimant had not undergone surgery at the time of the hearing, his post-hearing brief indicates that the surgery was subsequently performed and paid for by Employer.

[41] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[42] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

[42] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **October 2, 2003**, the date this matter was referred from the District Director.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability from March 10, 1995 to July 23, 1995, based on Claimant's average weekly wage of $505.90, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for temporary partial disability from July 24, 1995 through October 22, 1995, based on two-thirds of the difference between Claimant's average weekly wage of $505.90 and his wage earning capacity of $255.20 which resulted in a stipulated loss of wage earning capacity of $167.13, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(3).

3. Employer shall pay Claimant compensation for temporary partial disability from October 23, 1995 to November 19, 1995, based on two-thirds of the difference between Claimant's average weekly wage of $505.90 and his weekly wage earning capacity of $255.20, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

4. Employer shall pay Claimant compensation for temporary partial disability from November 23, 1995 to December 31, 1995, based on two-thirds of the difference between Claimant's average weekly wage of $505.90 and his weekly wage earning capacity of $503.60, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

5. Employer shall pay Claimant compensation for permanent total disability from July 29, 1996 through March 28, 2000, based on Claimant's average weekly wage of $505.90, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

6. Employer shall pay Claimant compensation for permanent partial disability from March 29, 2000 to December 19, 2002, based on two-thirds of the difference between Claimant's average weekly wage of $505.90 and his reduced weekly earning capacity of $239.60 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

7. Employer shall pay to Claimant compensation for permanent partial disability from December 20, 2002 to February

26, 2004, based on two-thirds of the difference between Claimant's average weekly wage of $505.90 and his reduced weekly earning capacity of $256.80, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

8. Employer shall pay to Claimant compensation for permanent partial disability from February 27, 2004 through the present and continuing, based on two-thirds of the difference between Claimant's average weekly wage of $505.90 and his reduced weekly earning capacity of $290.00, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

9. Employer shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 1996, for the applicable period of permanent total disability.

10. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's March 9, 1995 and September 18, 1995 work injuries, pursuant to the provisions of Section 7 of the Act, to include right shoulder surgery.

11. Employer shall receive credit for all compensation heretofore paid, as and when paid.

12. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

13. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 22nd day of October, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge